FOR THE BETTER ADMINISTRATION OF JUSTICE:

COUNTY COURT REFORM IN LATE-NINETEENTH-CENTURY
BRITISH COLUMBIA

BY

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ABSTRACT

This thesis seeks to explain how civil procedure legislation enacted in British Columbia in the 1870s was motivated by a desire to make the province's county courts conform to the requirements of an expanding commercial community. The county courts system had evolved in the colonial period to serve the limited legal needs of a sparsely populated country. It was modeled on English county courts, but local circumstances had required that a number of compromises be made in the administration of justice. The most significant deviations from the English model were that administrators appointed lay magistrates to serve the courts and they endowed the court with a very high jurisdictional limit in civil cases. Despite public agitation in the late 1860s to formalize court procedure no significant changes were made to the courts when British Columbia entered Confederation in 1871. In the first years of the new province members of the legislative assembly championed the cause of civil procedure reform in the courts. In contrast, the judiciary resisted change to this government institution and to a way of life that they had established in the colonial era.

This study is based on an extensive examination of literary sources as well as a quantitative analysis of court records. One goal of the research was to discover the urgency of court reform in the post-Confederation period. Recent British Columbia legal historiography has suggested that would-be court reformers tried to implement changes that were premature. The quantitative
research presented in this study supports the argument of reformers that change was required for the better administration of justice. At Confederation the extant courts system was stifling economic development. In response materialist, progress-minded legislators adopted court reform initiatives instituted in contemporary English common law courts to facilitate commercial expansion. In conclusion, this examination of court reform suggests that the rationalization of the county courts system advanced the development of capitalist social relations in British Columbia.
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CHAPTER 1
INTRODUCTION TO THE LEGAL HISTORIOGRAPHY OF BRITISH COLUMBIA

Nineteenth-century British Columbia's "free market" economy was a heavily regulated market place. In the period immediately after British Columbia joined Confederation in 1871, the province's farmers and petty industrialists anticipated the beneficial expansion of their market by a railway link with eastern Canada. However, the province's immature commercial structure and the dominion's inability to meet the Terms of Union limited economic growth. Furthermore, the late-nineteenth-century Atlantic trading community was in a period of stagnation. In the name of the public good, British Columbia's agriculturists, ranchers and miners demanded governmental assistance to facilitate their goal of economic development. Provincial legislators responded to this private need by pursuing an aggressive public works program and by creating a legal environment that allowed speculative enterprise based on credit relations.

This study will examine the relationship between the law and the economy in British Columbia through a discussion of legislative action and a description of civil court transactions. The subject period encompasses British Columbia's entry into Confederation to the completion of the transcontinental railroad while emphasizing the reform movement of the 1870s. From 1871 to 1885 the province was isolated from eastern Canada, but Ontario provided a model of commercial expansion that British Columbians hoped to imitate. Following Ontario legislators' example, British Columbia's newly elected politicians
attempted to use legislation to shape the economic development of British Columbia. Their reform program included instrumentalist measures intended to facilitate the growth of domestic industry. Legislators wanted to reduce British Columbia's dependency on goods and services from the western United States. Another aspect of the reform package was an overhaul of governmental institutions, including changes to the justice system. Provincial legislators identified the courts as an obstacle to economic growth, and they targeted the courts for reform throughout the 1870s and 1880s. The publication of a set of County Court Rules in 1885 marked the success of legislators to institute significant changes to the justice system that they had been struggling to implement since Confederation. Court reform by legislation was part of an administrative policy to provide services that better served the needs of an expanding commercial community.

The history of law that examines the relationship between the law and the economy has special significance for the study of Canadian history due to the active role that the state has taken in public economic development.1 American scholarship provides some excellent theoretical perspectives to govern research in this area.2 In his book, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956), and in other monographs on the lumber industry and the law in Wisconsin, J.W. Hurst put forward the basic premise that

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nineteenth-century American law was calculated to facilitate the release of individual creative energy. Hurst characterized this era's law-making as influenced by "instrumentalist" principles, which shaped the social, political and, especially, economic organization of society. Morton Horwitz developed the theme of the instrumentalist function of law in nineteenth-century America in his book, *The Transformation of American Law* (1977). Horwitz described how legislators implemented changes to contract, tort and property law to uproot privileges based on ancient usage as inherited from English common law. He also documented how members of the judiciary contributed to changing attitudes about the function of law in society. Influential decrees in precedent-setting court cases showed that American judges were willing to interpret statute law in ways that were favourable to commercial interests. The judiciary helped to fashion a value system that equated public interest with private right. Writing about the American West, Gordon Bakken has examined the legislation of territorial legislatures and their support for the mining industry. His legal research detailed how legislators rewrote water rights regulation to facilitate the most productive use of water power. The Colorado and Wyoming legislatures used liberal incorporation statutes to allow individuals to capitalize ventures and empowered them to make contractual agreements in the name of corporations. Concerning the Canadian legal environment R.C.B. Risk has shown that many of

the instrumentalist initiatives promoted by New York legislators were adopted in Ontario to facilitate public economic development. But he also concluded that conflicting cultural values limited the extent of such borrowing by Ontario legislators. The conservatism of Ontario's political elite restrained their inclination to imitate all the permissive legislation of their North American contemporaries. To summarize, then, legal historians writing about the law and the economy in nineteenth-century North America are in agreement that law and changing attitudes about its function in society promoted the growth of industrial capitalism.

The Hurstian school of legal history has significantly shaped recent North American legal historiography, but its influence on the writing of British Columbia's legal history has not been so profound. Robert Cail researched the conveyance of public lands to private individuals in nineteenth-century British Columbia and initiated a direction of study in legal history similar to that followed by Hurst and his students. Cail wrote about the principles that guided public land disposal in the colonial and early provincial period. He recognized that these principles included attitudes about the law of property and that these attitudes changed over the course of British Columbia's development. Cail


identified divergent factions in the political elite of British Columbia with conflicting ideas about the proper method for the granting public lands. Colonial law-makers attempted to foster a citizen body of responsible property-owning individuals who made "beneficial use" of public lands granted them in fee simple. Provincial politicians co-opted to a degree the guidelines used by colonial legislators to grant public lands, but they were increasingly motivated by a desire to promote economic development through generous land transfers. Cail's description of the "beneficial use" principle articulates law-maker's prejudice to allocate lands only to individuals who would make resources productive. 9 Cail also described the way that legislators employed other instrumentalist measures, including wild land taxes and stipulations about working mining claims, to discourage speculation and monopolistic enterprises. In Cail's estimation the wise and forward-looking principles that had shaped Governor James Douglas' legislation were discarded by provincial administrations, especially those headed by William Smithe (1883-87) and John Robson (1889-91). In Cail's opinion, these ministries adopted a "give-away" policy to encourage investment in transportation companies. 10 Cail's romantic depiction of the guardianship of British Columbia's public lands by Governor Douglas as a "lost golden age" detracts from the critical perspective of his work; however, his book revealed how law-making shaped the social organization of the country in the colonial period and promoted industrial growth in the national period.

The majority of British Columbia's legal historiography for the nineteenth-century period has not followed the direction in legal history pioneered by Hurst

9 Ibid. xiii and throughout.
10 Ibid. p.166.
and others, which has stressed the importance of legislative assemblies in legal history. Rather, two prominent trends are identifiable in the legal historiography of the new province. The first is that historians have chosen to concentrate on criminal law, or more specifically, the enforcement of law. And secondly, legal historical writing in British Columbia has focused on the judiciary and the development of court structure. Historians writing about criminal law have displayed a subjective interest in proving the civility of British Columbia's frontier days. They seek a point of contrast with the American frontier experience and attribute the distinctive character of modern Canada to the state's benign beginnings.

Archives-based histories of recent years have drawn into question the premise of these works, viz. that the modern cultural identities of the United States of America and Canada stem from their distinctive frontier experiences. Roger McGrath's re-assessment of frontier violence in the American West revealed that levels of violence have been vastly exaggerated. Statistics

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13 Roger McGrath, Gunfighters, Highwaymen and Vigilantes: Violence on the Frontier (Berkeley: University of California Press, 1985); J.P. Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail (San Marino: Huntington Library, 1980). Reid asserts that overlanders brought their respect for personal property and rights on the trail and that the trek was relatively violence-free; Eugene Hollon, Frontier Violence: Another Look (New York: Harcourt, Brace and World, 1974). For a sophistic treatment of the ethnology of law on the North American frontier, which qualifies, but reasserts, the general assumptions about the levels
presented in his book show that legendary wild west towns, such as Bodie, California and Aurora, Nevada, experienced substantial lawlessness solely during the short boom periods of the respective towns. Of comparable significance, Canadian research has provoked a re-evaluation of earlier suggestions that the Canadian frontier was violence-free. Historians writing from both national perspectives have offered revisionist interpretations of cultural attitudes about law and the incidence of violence on the periphery of non-native population expansion in their respective countries. This new work exposes the weakness of earlier histories that depended on a nationalistic vision for its thematic content.

The second major subject of study in British Columbia's legal historiography concerns civil procedure (the organization and administration of justice) in the courts. Early studies on this subject attempted to explain the evolution of the Supreme Court through a review of the statute law that governed the administration of justice. R.G. Herbert and Jesse Gouge wrote about historical change as if it were limited to the realm of substantive law. In their writing, the social, political and economic forces that shaped the development of the superior courts did not receive due consideration. Their work fails to identify who the law-makers were and the provenance of court reform legislation. David Farr's article on the organization of the judicial systems in the colonial period is a

much more comprehensive and informative account of historical change in the courts. His work encompassed a study of the inferior and superior courts of the colonies and described the growth of the justice system to accommodate the legal service needs of the community. Hamar Foster's recent publications on civil procedure in the courts incorporate strategies in legal research prominent in the historiographical school labeled the "new" legal history. Legal historians writing in this vein concentrate on law in the context of society. Foster employs this research methodology while drawing on a broad range of historical sources other than purely legal materials to explain the evolution of the courts. But if Foster's methodology is progressive in the field of legal research in British Columbia, his concentration on the judiciary's perspective on court reform is typical of conservative legal history. While describing the political debates concerning the source of authority to make rules of court for the provincial courts, Foster takes a partisan perspective that compares the "rational" constitutional arguments of the Supreme Court Justices with the fallible law-making of provincial politicians. The legal historiography of nineteenth-

century British Columbia requires further research that investigates more fully the organization of the inferior courts and the role of provincial legislators in shaping the judicial system of post-Confederation British Columbia.

The strength of Tina Loo's examination of law and political authority in colonial British Columbia derives from her application of modern research methodologies and use of diverse theoretical perspectives to explain the nature of this relationship. Her study documents a transformation of law in history from judge-made law to formalism in law, a shift she attributes to the changing social structure of the colony. Her sensitive treatment of the legal history of the period reveals that two cultural value systems contributed to the making of the province. One was the legacy of eighteenth-century paternalism as embodied in the "common sense" justice of Chief Justice Matthew Baillie Begbie. The second was the demands of the nineteenth-century market-driven economy, which required certainty and predictability from the justice system to regulate formalized commercial transactions. Her contribution to British Columbia legal historiography suggests the need for a study of legal change and its relationship to the economy in the post-Confederation period.

To broaden the scope of inquiry in the legal history of this period this study examines civil procedure reform in the province with a new perspective. British Columbia's legal historians have concentrated on the superior courts, and

19Tina Merrill Loo, "Law and Authority in Nineteenth-Century British Columbia, 1821-1871."
20With a few exceptions, Nancy Kaye Parker, "The Capillary Level of Power: Methods and Hypotheses for the Study of Law and Society in Late-Nineteenth-Century Victoria, BC." (M.A. thesis, University of Victoria, 1987) A study of the inferior courts; see also Farr, "The Organization of the Judicial Systems," and Loo, "Law and Authority," especially, Ch. 3. Foster deals with civil procedure reform in the county courts in an incidental manner as it related to the conflict between the judiciary and legislators ; "...Law and Politics in British Columbia," pp. 171-79.
have been limited by a perspective that considers legal history to be the history of judges and statute law.\textsuperscript{21} This study focuses on the inferior civil courts and attempts to explain how the demands of a credit-based economy commanded the need for court reform. An examination of the county courts is warranted because the majority of civil litigation in the province was handled by the lower courts, and because the magistrates of these courts were the focus of reform proposals after Confederation.\textsuperscript{22} These court officers had no formal training in law, but they did have the confidence of the colonial administration. Governor Musgrave recommended that the county court magistrates' tenure should not be affected by Confederation with Canada.\textsuperscript{23} His counsel to retain the magistrates was based on his desire to expedite Union and to reward these civil servants for their loyal service. But following Confederation the status of these gentlemen attracted the ire of the public who used the courts, and provincial legislators selected them for early retirement.

This archives-based study hopes to suggest explanations for the various court reforms introduced and implemented after Confederation. Starting from Tina Loo's supposition that a materialistic society based on a market-driven


\textsuperscript{22} The magistrates of the County Court were styled "County Court Judges," but not one was duly appointed before 1884. An Ordinance to amend and assimilate the procedure in the County Courts in all parts of the Colony of British Columbia, 1867, \textit{R.S.B.C.} (1871), 34 Vic., c. 95, sec. 3 (repealed 41 Vic., c. 20) authorized the Governor-General of Canada to appoint any Stipendiary Magistrate or Justice of the Peace a County Court Judge, but no such appointments were made. For the remainder of this essay the members of the bench of the county court will be referred to as "magistrates."

\textsuperscript{23} Governor Musgrave to the Earl of Kimberly, 3 June 1871. Colonial correspondence sitied by Attorney General G.A. Walkem in "BC Attorney General, Opinion on Various Topics, 1864-1879." 9 April 1873, file 12, GR 1459. British Columbia Archives and Record Service (BCARS).
economy had overwhelmed an ordered society based on a moral economy in the colonial period, it is reasonable to hypothesize that governmental institutions held over from the colonial period, such as the courts, would present obstacles to modernization. Whereas "common sense" rulings had functioned tolerably well in a face-to-face organic community, a codified and formalistic law was essential to the smooth operation of a complex commercial system. This study seeks to explain how civil procedure legislation enacted in the 1870s was motivated by a drive to make the courts complementary to an expanding commercial system.

Chapter Two provides historical context for an examination of the county courts. The chapter describes the institutionalization of the inferior courts in the colonial period and illustrates the reasons why there were demands for court reform in the national period. Chapter Two also presents the intellectual perspective and political agenda of the two factions offering reform programs to improve the administration of justice. Chapter Three examines the diurnal business of the courts. A quantitative and descriptive analysis of county court transactions in two selected courts introduces the specific problems of the courts in the 1870s. The chapter describes how the existing court structure and civil staff failed to satisfy the legal service needs of British Columbia as the country developed. The quantitative data presented in the third chapter supplements literary evidence that the courts and its officers were inadequate. Chapter Four discusses legislators' aims at improving the court system, and the difficulties they encountered in implementing a feasible reform program.

The thesis argues that economic change and commercial expansion prompted court reform legislation. The courts, as inherited from the colonial
period, failed to meet the requirements of a materialist, growth-oriented country. The superior courts did not provide equally accessible justice on a province-wide basis, and the inferior courts could not ensure the enforcement of their orders in an efficient and inexpensive manner. Debate over the character of the lower courts pitted members of British Columbia's colonial elite- individuals who had a vested interest in maintaining the structure of the courts as it stood at Confederation- against a group of newly empowered legislators who, motivated by self-interest, demanded judicial change that would facilitate economic growth.
CHAPTER 2
HISTORICAL CONTEXT FOR AN EXAMINATION OF THE BRITISH COLUMBIA COUNTY COURT SYSTEM

The Institutionalization of the County Courts

The growth of the British North American colonies on the west coast required that administrators in the Colonial Office make provisions for the administration of justice, especially in criminal matters.\(^1\) Drawing on their experience in other colonies they recognized that it was a practical measure to provide courts with varying levels of jurisdiction. In this way, inferior courts handled simple civil cases and criminal misdemeanors in a perfunctory and inexpensive way. Superior courts administered civil cases that involved fine points of law or large sums of money and serious criminal infractions. These courts operated in a more formalized manner and imported the well-tried traditions of English common law tribunals.

To arbitrate civil suits twin-tiered justice systems were instituted in both of the British North American colonies on the west coast. On Vancouver Island major civil actions were administered in the Superior Court of Civil Justice, presided over by Justice Cameron, a lay judge replaced by Joseph Needham in 1864. The Small Debts Court, established in 1856, provided a means to settle disputes up to £5 at a reduced scale of fees. Originally, Cameron presided over

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both courts, but this arrangement proved unmanageable since appeals from the lower court came before the same judge in the higher court. Responding to this problem, lay magistrate Augustus Pemberton commenced hearing civil suits in the Small Debts Court, and he assumed regular duties in the court in 1865 when Justice Needham refused to sit in the lower courts. On the mainland colony civil justice was divided between the Supreme Court of British Columbia and inferior courts: the Mining Court and the Stipendiary Magistrate's Court. Gold Commissioners staffed the Mining Court, and they adjudicated mining disputes in the mining districts. The Stipendiary Magistrate's Court, or "County Court" as it was called in colonial correspondence, adjudicated petty civil cases throughout the mainland. Justice Begbie was the sole judge in the superior court; appointees, including career civil servants Peter O'Reilly, W.R. Spalding, H.M. Ball, and E.H. Sanders (variously Saunders), served the inferior tribunals.

At the merger of the colonies and the eventual settling upon Victoria as the capital of the colony in 1868, justice became more centralized. The Colonial Office required that the Supreme Court Justices and the Attorney General live in Victoria. Local Stipendiary Magistrates adjudicated petty criminal and civil actions in all parts of the colony. These government agents acted in numerous capacities: Police Magistrates, County Court Judges, Gold Commissioners,

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2"BC Attorney General, Opinion on Various Topics, 1864-79" (Crease), 25 October 1865, file 3, GR 1459, BCARS. On the problem of Needham refusing to act in the "County Court" of Vancouver Island, Attorney General Crease recommended that Pemberton open the Small Debts Court and "settle up cases now on hand and any new cases which may arise." (emphasis added) Crease clearly felt it was expedient to make use of the present judicial power at hand, although he noted that Pemberton was not professionally trained and that he would likely know most of the litigants personally.

3H.P.P. Crease, to Z. Lash, Deputy Minister of Justice, 9 September 1878, Add MSS 54, folder 12/65, folio 8501. BCARS. Crease asserted this fact in a letter arguing amongst other things that the local legislature could not appoint the residence of the Justices.
Indian Agents, Assistant Commissioners of Lands and Works, Postmasters, Justices of the Peace, and general government agents. Semi-annual circuit courts to the centers of population served major criminal and civil actions, whereas less populated regions, such as Kootenay and Cassiar, received fewer circuits. Highly qualified judges staffed the superior court, and these Justices were expected to use their formal training and resourcefulness to meet the demands of significant criminal and civil breaches of justice. The inferior court developed as a catch-all for court business that did not demand the attention of a legally-trained individual. Legal transactions, such as insolvency actions, probates of wills, and court-ordered injunctions, were reserved for Supreme Court Justices. Since the Justices lived in Victoria, these legal services were accessible solely in Victoria, except when the Justices were on circuit.

The County Court Ordinance of 1867 formalized the organization of the county courts in British Columbia. This Ordinance repealed Vancouver Island and British Columbia colonial statute law relating to district courts and made English legislation governing county courts universally applicable throughout the united colony. The county court system included six informal judicial districts, two on Vancouver Island and four on the mainland, and a magistrate was attached to each district. According to the Ordinance, the magistrate was to hold

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4 An Ordinance to amend and assimilate the procedure of the County Courts in all parts of the Colony of British Columbia, 1867, Revised Statutes of British Columbia(1871), 34 Vic., c. 95. All colonial acts, ordinances and enactments are sited as they appear in the Revised Statutes of British Columbia (R.S.B.C.) published in 1871. In general, statutes are sited in the text by the abbreviated "short title" and referenced in the footnotes by the long title.

regular circuit courts within the designated districts following the rules of court procedure prescribed in the English acts. The magistrates appointed were the five individuals cited above: Pemberton, Spalding, Ball, Sanders and O'Reilly, as well as A.T. Bushby, a registrar in the court system. These men had received no formal legal training but gained their appointments based on their experience in the local courts of British Columbia and Vancouver Island. Despite their lack of formal training Governor Musgrave expressed confidence in these gentlemen, and colonial administrators apparently consented to the appointments with few reservations.

David Farr has suggested that "...the system of local courts grew up naturally as part of the larger system, adjusting itself freely under the impress of changing and broadening conditions." He supports this vague statement with a hint that civil litigation may have been clogging the operation of the Supreme Courts and that it was this situation that prompted administrators to expand and formalize the civil jurisdiction of local magistrates. Whether the courts developed "freely" or were crafted to meet the practical need to unburden the superior courts, British Columbia officials assumed that English justice could be

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6In her study of the colonial courts, Tina Loo presents evidence that suggests that certain of these men recognized their deficiencies as judges. Although educated at Eton and Oxford, Philip H. Nind, Stipendiary Magistrate at Alexandria, refused a County Court Judgeship and sited his lack of training and inferior legal knowledge compared to some of the litigants in court. p. 220.  
7Lord Buckingham to Governor Seymour, 25 March 1868, GR 2045. (Microfilm B-2 and B-3) BCARS. Buckingham's only advice on the County Court Ordinance of 1867 was that, should it be necessary to redraft this Ordinance it is worthy of consideration whether it would not be better to set out such of the provisions of the Imperial Acts as it is thought advisable to introduce into the colony, rather than to make a general reference as in the present ordinance to all the Imperial Acts."  
8Most British Columbians would not have been familiar with the sited Imperial legislation and therefore would have been uncertain about the procedure in the courts.  
9Ibid., p. 33.
imported to the province by copying English institutions. The significant flaw in this line of reasoning was that the English model was not copied completely; thus, suitors in British Columbia could not avail themselves of the full recourse of English justice.

The British Columbia county courts were modeled on the English courts, but practical considerations compromised the administration of justice. British Columbia's legislators followed the principle pioneered by Governor Douglas in 1858 to adopt English laws "...so far as they are not, from local circumstance, inapplicable to the colony of British Columbia." Consequently, English county courts legislation and derivative British Columbia enactments were not entirely alike. "Local circumstances" made it impossible to follow the stipulation of the English county court Acts that the County Court Judges be barristers-at-law.10 Before Confederation, there were thirteen barristers on the Barrister's Roll for the province of British Columbia, an insufficient number of legal men to staff the six magisterial positions of the inferior courts and meet the requirements of the bar.12 The County Court Ordinance of 1867 did not designate that the appointees to the county court bench be formally trained in law. It merely authorized the Governor of British Columbia to appoint any Stipendiary Magistrate or Justice of the Peace to be a County Court Judge. Since the colony's Stipendiary Magistrates and Justices of Peace were not legally-trained men, lay magistrates continued to serve the local courts of the island and mainland after the merger of the colonies.

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10 Proclamation dated 19 November 1858 as sited in Gouge, "Civil Procedure in the Superior courts" p.345.
11 1846, 9&10 Vic., c. 95, sec. 9.
12 Copy of "Barrister's Roll for the Province of British Columbia," (n.d.) in the Attorney General Records Finding Aid, 7A. BCARS.
Other differences between imperial and colonial county court legislation reveal that British Columbia legislators wanted to create an institution that was suited to local circumstances. The colonial government lacked the personnel and the finances to provide a full courtroom staff; consequently, the Ordinance enacted that the "County Court Judge" perform the duties of the court registrar.\textsuperscript{13} In the 1860s the practice of the courts had developed whereby the clerk of the court also performed certain of the duties of the sheriff, such as serving execution summons. In this way the same court officer was responsible for administering courtroom duties and for serving court orders outside the courtroom. In the interest of minimizing the number of court officers necessary to administer justice, the Ordinance did not change this ambiguous procedure. In addition, section four established the jurisdiction of the court at $500. This was double the jurisdiction of the English courts,\textsuperscript{14} and it suggests that administrators wanted to establish the county court as the major civil court of the colony.\textsuperscript{15}

The County Courts Ordinance of 1867 formalized procedure in the inferior courts and established a standard county courts system on the island and the mainland. However, administrators failed to provide the people British Columbia with faultless inferior courts. One problem was that the Ordinance perpetuated a

\textsuperscript{13} R.S.B.C.(1871), 34 Vic., c. 95, sec. 12.
\textsuperscript{14} An Act to Extend the Act for the more easy Recovery of Small Debts and Demands in England, and to amend the same, 1850, \textit{Statutes of England}, 13&14 Vic., c. 61, sec. 1. The jurisdiction of the court was originally set at $20, 1846, 9&10 Vic., c. 95, sec. 58.
\textsuperscript{15} 60.9% of all actions in the County Courts in the colonial period were below $100. Loo, "Law and Authority," p. 123. One explanation for colonial administrators decision to establish the high jurisdiction of the county court may have been that they hoped to minimize judges' travel expenses. Traveling expenses were a highly contentious issue between the Justices and Ottawa and if civil business could be handled locally it would have released the Justices from making frequent circuits of the Supreme Court.
system of courts adjudicated by lay magistrates, and another was that it did not clearly define the responsibilities of the various court officers. Furthermore, the Ordinance made no reference to the jurisdiction of the court in actions entered in equity. Nineteenth-century law distinguished between suits heard before the common law and those heard before equity law. A judge decided a common law action according to precedent as established in the courts since time immemorial. An action brought in equity required that the judge base his decision on the circumstances surrounding the particular case and on equity law. Before the judicature reforms of the 1870s in England, it was necessary to enter an action in the appropriate jurisdiction before the court hearing.\textsuperscript{16} If a plaint was entered incorrectly the suit might be dismissed on technical grounds. Since there is no mention in the British Columbia Ordinance to the cognizance of the magistrates in actions entered in equity, it must be assumed that the practice of the English courts was adopted, where the County Court Judges had cognizance in both equity and common law actions. English judges were competent to instruct litigants about which proceeding was most advantageous to their particular circumstances. However, the administration of justice by lay magistrates in the British Columbia courts negatively affected the equitable rights of litigants. In the superior courts of British Columbia suitors could bring an action in equity in the Chancery Court and a common law suit in the Court of Common Pleas. A similar recourse did not exist in the inferior courts, and

\textsuperscript{16}For an explanation of the reforms instituted by the "Judicature Acts" of 1873, 1875 and 1876 see Gouge, "Civil Procedure in the Superior Courts," pp. 348-351. These reforms were modeled on changes in civil procedure initiated in New York by the Field Code (\textit{Laws N.Y.} 1848, c. 379) outlined by Lawrence Friedman, \textit{A History of American Law} (New York: Simon and Schuster, 1973), 340-7. Law reform was designed to simplify the procedure for entering plaints and to extinguish the inconvenience and risk to suitors that their actions be dismissed on technical grounds.
consequently, all actions were heard as "common law" actions. Equitable rights were further trenched upon by the condition that appeals to the higher court were allowed only on a point of law, not on the facts of a case.

The ambiguity of the Ordinance on the matter of the magistrates' cognizance in equity actions suggests that administrators either overlooked the matter, or, more likely, neglected to include provisions for jurisdiction in equity. Administrators did not believe that it was necessary to import this subtle legal technicality. Instead, the inferior court was instituted as a simplified dispute settlement forum. Justice system administrators, including Governor Seymour and Attorney General Crease, wanted to create local courts that were economical to administer and yet served what were perceived to be the limited legal needs of a sparsely populated colony. Seymour and Crease anticipated that lay magistrates would be able to judge cases on points of fact and would not need formal training in law. In addition, court procedure was simplified to make the management of court business possible in the absence of professionally-trained officers. Administrators did not believe that the province needed an elaborate justice system that imported the technical and symbolic formalities of English law tribunals. The British Columbia county courts were instituted as a court of fact and not of law, and this arrangement suited the rudimentary legal knowledge of its officers.

At Confederation the courts were essentially the same as constituted by the County Court Ordinance of 1867; however, the question of whether to retain the courts as established arose in the Confederation debates. Governor Musgrave was a staunch supporter of the county courts system that had developed in the colony. In a dispatch to the Colonial Office he informed
English officials that he considered the position of county court magistrates "singularly well filled" and stated that he did not believe the officers of the court would be affected by political changes on the admission of British Columbia into the Dominion.\(^{17}\) The Colonial Office accepted Musgrave's assessment of the legal needs of the country, and following directives from Imperial officials the Seventh Session of Legislative Council of British Columbia made provisions to retain the incumbent magistrates after Confederation.

**Political Division Over Court Reform**

The political struggle for control of the Supreme Court after Confederation originated in the colonial period as dissatisfaction with the courts and its officers fermented.\(^{18}\) Friction between the judges and would-be reformers coalesced over the proper function of the justice system in society. On one side of the issue, the judiciary and their supporters believed that the court structure that had developed in the colonial period was adequate for the legal service requirements of the country. As Justice Crease noted in one letter to the federal Minister of Justice,

> The County Court System that is wanted is one, which should arise from the natural growth and prosperity of the country. It [does not want] a system of forced growth prematurely ushered into being...\(^{19}\)

The judges believed that local lay magistrates were competent to handle petty criminal actions and minor civil disputes after Confederation while circuit courts of the Supreme Court would serve the more important legal service needs of the country. In this way, a non-resident, and therefore impartial,

\(^{17}\) Governor Musgrave to Lord Lisgar, 22 November 1870 as cited in, "BC Attorney General, Opinions on Various Topics, 1864-1879" 9 April 1873, file 12, GR 1459. BCARS.

\(^{18}\) This section builds on Hamar Foster’s work, "...Law and Politics in British Columbia."

\(^{19}\) Crease to Blake 27 March 1877 Add MSS 54, file 12/65. folio 8309. BCARS.
professionally-trained individual would adjudicate grave criminal infractions and significant civil disputes. The majesty of a Justice on circuit would also serve the symbolic function of importing an uplifting moral tone to the coarse back-country life of the mining towns. The judges' resistance to change in the courts had existed in the 1860s as well. Justice Matthew Begbie had repeatedly blocked requests from suitors for an appeals court on the grounds that it was an unnecessary expense. He felt confident that an appellate court would mechanically confirm the judgement of its brother judges. Pressured on the point of court reform in the national era, the judges adhered to their opinion that the extant justice system was adequate.

Suitors in the court and their elected representatives in the legislative assemblies demanded a formalized justice system that relied on written codes. Whereas the judges believed that a courts system without an appellate division was adequate, this faction considered the incontrovertible power of the judges arbitrary. And as Tina Loo shows, popular denunciation of Begbie's decisions in a number of celebrated mining cases highlighted the inadequacies of judge-made law. These would-be reformers required accountability from the Justices and wanted to institute reforms that would assure the security of capital and contract in the courts. These factions existed in the colonial period, but it

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20 *Aurora Co. v. Davis Co.* (1866) raised the problem of the need for an appellate court from the Gold Commissioners Court. The case is documented in the *Cariboo Sentinel* (Barkerville), 28 May 1866, "Chancery or Law?" Letter to editor from Miner, p.2; 31 May 1866, "Irresponsible deputies: decisive stand taken by Judge Cox," p.1; 31 May 1866, Letter to ed. from Miner, p.2; 4 June 1866, "Judge Begbie and his judges," Letter to ed. from Onyx, p.2 (Defence of the judges-written by Begbie?); 11 June 1866, "Judge Begbie and his judges," Letter to ed. from Caustic, p. 2.

was only in the national period that opponents to the existing judicial structure possessed the political power to initiate reform of the courts.

A prosopographic survey of these political rivals reveals that there were intellectual differences and places of origin distinctions between the two factions making up the governing elite of British Columbia. The Justices of the Supreme Court and the magistrates of the inferior courts and their supporters such as Senator Clement F. Cornwall were part of a group of appointed officials. Generally, they were recent immigrants from the British Isles and had gained their appointments during the colonial period. Begbie, Crease and Cornwall came from upper-middle class families in England who owned small propertied estates. They had been educated in England, and they imported their family values and ideas about the role of government to British Columbia. Gregory Thomas describes the country gentleman/rancher, Clement Cornwall, as part of a significantly larger group of British settlers and officials who, from their base on Vancouver Island, exerted a considerable influence upon the tone and direction of British Columbia society.22

This group's stand on a number of contemporary political and social issues illustrates their intellectual perspective. As one example, the Justices' influence on the operation of the Married Women's Property Act, 1873, helped to define women's position in society and the sanctity of marital unity.23 This Act was modeled on contemporary legislation in England and Ontario and was an egalitarian measure formulated to delimit married women's rights in the

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marketplace. The Justices' interpretation of the statute in a number of court cases reveals their attitudes about family values and marital unity. Instead of invoking the statute to justify women's rights to transact commercial relations independently from their husbands, the Justices used the Act as a measure to ensure that husbands lived up to their obligation to provide for and protect their families. When husbands were negligent in their responsibility to their families, the Justices implemented the statute to protect married women's personal property such as their dowry from the squandering hands of their husbands. Paulette Falcon has argued that,

> Instead of fulfilling its potential, the Act became another extension of the protective domestic legislation affecting women and the family that was characteristic of the nineteenth century.\(^{24}\)

The Justices imprinted their vision of society on the country through their court decisions and influence as respected members of the community.

On contemporary political issues the Justices also expressed conservative values. They opposed Union with Canada, supporting instead the concept that British Columbia remain a colony within the British Empire.\(^{25}\) The judges had material reasons for opposing confederation: they feared the loss of their jobs and pensions. But they were also intellectually opposed to the idea of representative government by universal suffrage. The construction of the transcontinental railway was among the most divisive of issues in the new

province. However, it did not preoccupy the judges because they, unlike the majority of British Columbians, were not motivated by a desire to see the province prosper economically. In one instance, Begbie wrote about the railway with the bemused attitude of a disinterested observer:

> Everybody is anxious here for the success of the Railway. The pecuniary amount is so enormous, the risk considerable, the difficulties of assessing the various competing termini on the coast so heavy, notwithstanding the energy of expense and labour in the last year's surveys- that I for one shall not be disappointed if it be found impossible to commence the line at the time indicated, at least otherwise than formally.26

In their attitudes about social and political issues the judges and their supporters expressed their resistance to radical change. The judges did not oppose progress and they were not ignorant of the social leveling that occurred in colonies such as British Columbia. They did, however, retain certain conservative and paternalist ideas engendered in the social fabric of their class backgrounds.

Opposing this group was a coalition of progressive-minded, materialist individuals, who had immigrated from eastern Canada to British Columbia. Amor De Cosmos, one of the staunchest advocates of Confederation and an immigrant from Nova Scotia, saw union with Canada as a means to achieve his goal of economic growth for British Columbia and as a vehicle to gain responsible government.27 In the post-Confederation period, De Cosmos and other reformers hoped to pare down what they believed was a bloated civil list. Reformers specifically identified the incumbents of the county court bench as

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26 Chief Justice Matthew Baillie Begbie to Louis Fournier, Minister of Justice, 23 April 1873, O'Reilly Collection, BCARS, E/C/B41.
targets for early retirement. They believed that a smaller number of replacement, professionally-trained appointees would be able to handle the legal service needs of the community more efficiently than their lay predecessors.

Reform of the courts constituted an integrated part of legislators' administrative policy to create an economic environment compatible with commercial and industrial development. An introduction to the view of legislators and business leaders on political economy will show that British Columbians recognized the potential that law-making offered to facilitate domestic economic development and that they had very different attitude about state management and the meaning of progress than reactionary components of British Columbia society. Successive ministries shared a common commitment to the expansion of British Columbia's commercial economy through instrumentalist legislation. Reform of the county court system represented only one of the measures that legislators took to encourage economic expansion.

**Instrumentalist British Columbia Legislation**

Instrumentalist legislation is a broad and ill-defined term. Essentially all legislation is "instrumentalist" in that individual statutes are formulated with a particular aim in mind. However, this term, as used by Hurst, Horwitz, Risk and others, refers to a specific development of nineteenth-century law-making whereby legislators, and especially state or provincial legislators, used object-directed legislation to create opportunities for economic development. Instrumentalist statutes often benefited a particular sector of industry,\(^\text{28}\) promoted technological development and industrial efficiency through

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permissive measures, or granted indemnities to industry to minimize risk from loss. Instrumentalist legislation typified British Columbia's law-making efforts to aid regional economic growth, and the succeeding paragraphs provide examples of such enactments in British Columbia. While the federal government disallowed some of this legislation, it should not mean be dismissed as irrelevant. Disallowed legislation reveals as clearly as sanctioned enactments the aim of law-makers to channel economic development and to release potential energy from the province's natural and human resources.

One of the greatest needs of the province's isolated centers of industry, agriculture and commerce was an efficient communications network. In nineteenth-century eastern Canada legislators promoted an extensive canal network, river improvements and trunk railroads to increase the carrying capacity of transportation companies. In British Columbia public works programs most significantly took the form of road construction projects to link the interior's miners and agriculturists to the commercial centers of Victoria and New Westminster. Ever since 1862-3 when the Douglas government commissioned the vast project to construct the Cariboo Road, British Columbia's legislators made a concerted effort to create an intra-provincial trunk road system.

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This (public works) policy is the true basis of a successful immigration scheme in the future. Its advantages are not confined to success in this quarter. It will stimulate trade. It will improve the condition, and increase the prosperity of our farmers, by affording them easy access to new and at present, inaccessible markets for the sale of their produce. It will ensure profitable employment to our merchants. It will develop our mineral wealth. It will materially assist our pastoral interests, and thus retain for expenditure in the Province, if not wholly, large sums of money which hitherto have been
Confederation, administrators also tried to lower the costs for private individuals and commercial groups using the province's roads. The Department of Lands and Works redeemed certain chartered toll roads and replaced private ferry companies with serviceable public bridges.\(^{32}\) The public works policy was formulated to help domestic producers and shippers control the flow of goods entering and exiting the interior of the province and was inspired by a belief that investment in communications added value to otherwise valueless resources.

As well as allocating roughly 30-50% of the annual budget to public works in the 1870s and 1880s,\(^{33}\) the provincial government used toll legislation on the province's roads as a discriminatory internal tariff. Tolls on the Cariboo Road had helped pay for the road's maintenance since its earliest days and ensured that local "taxes" paid for local improvements. Legislators attempted to replace the hated tolls with a general road tax assessment on all property owners, but this measure proved to be even more unpopular.\(^{34}\) The first G.A. Walkem administration (1874-76) recognized the need to reinstate the road tolls but

\(^{32}\) For example, "Report of the Chief Commissioner of the Department of Lands and Works," B.C. Sessional Papers. (Victoria: Richard Wolfenden, 1875). In the Cassiar the Dept. "...redeem[ed.] Moore's Road Toll Charter in accordance with the Memorandum of Agreement, 12 April 1873, for $12500, $10000 for cost of the work and twenty-five percent additional."

\(^{33}\) Comparative Statement of the Receipts and Expenditures of British Columbia," B.C. Sessional Papers. (Victoria: Wolfenden, 1886). p.122A. The percentage of the annual budget spent on public works: roads, streets, bridges and the Esquimalt graving dock, was; 1872 - 36.5%, 1873 - 26.9%, 1874 - 49.7%, 1875 - 32.2%, 1876 - 49.8%, 1877 - 35.2, 1878 - 18.6%, 1879-80 - 18.6%, 1880-81 - 23.2%, 1881-82 - 30.5%, 1882-3 - 40.9%, 1883-84 - 30.3% and 1884-85 - 27.5%. For an average of 32.3% annually

\(^{34}\) One of the enactments of first post-Confederation parliament was to abolish the Cariboo Road tolls (Road Tolls Repeal Act, 1872, 35 Vic., c. 2) and instate a province-wide road tax, which proved even more unpopular as it was not an ad valorem tax and did not share the burden of funding road construction fairly.
wanted to legislate the tolls in a way that was most beneficial to the whole province. To achieve this goal British Columbia's law-makers used toll legislation to circumvent lack of control over tariff regulation forfeited at Confederation when British Columbia had accepted the Canadian tariff.\(^{35}\) In 1876 the legislature levied new road tolls that placed differential rates on domestic and imported goods.\(^{36}\) All goods going down the road from the interior were exempted from road tolls, as were domestic produce, farming implements, mining machinery and personal goods going up the road. The burden of the tolls was designed to fall on imported agricultural products and imported manufactured goods.

Advocates of domestic production over consumption of imported goods were eager to use legislation to promote new industrial enterprises in the province. One of the favoured means of encouraging the start-up of nascent industry was enactments that offered bonuses or rewards to entrepreneurs.\(^{37}\) Legislators also copied the initiative of their North American contemporaries and offered generous incorporation statutes to private individuals. The incorporation statute transferred public powers to individuals: to make contractual agreements in the name of a corporation, to generate capital investment through sale of stocks, to make decisions about capital spending and to limit the liability of
investors from loss to the amount that was invested. These powers permitted individuals to exercise their capacity to transact commercial relations in a structured, but relatively unfettered, marketplace. In British Columbia the majority of incorporation statutes established mining companies, banking institutions, a woolens factory, salmon-canning operations and transportation companies.

As another instrumentalist measure, property laws were changed to accommodate industrial development. Legislators in the post-Confederation period held different views about property rights than their appointed predecessors. Whereas appointed officials shared the social engineering philosophy of colonial administrators such as Edward Gibbon Wakefield, who hoped to reconstitute the class structure of England in the colonies through property law arrangements, provincial politicians were more interested in reforming property rights to promote economic development. The transformation of property rights in the mining industry is an instructive example of how legislators used law to encourage capital investment. Mining law change is also an example of how business leaders influenced legislation and evidence of the agreement between business and government about the mutual benefits of instrumentalist legislation to shape industrial growth.

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39 For examples, An Act to Incorporate the British Columbia Milling and Mining Company, 1878, 41 Vic., c. 4; Nanaimo Railway Act, 1881, 45 Vic., c. 25, et alia.

In 1873 the American miner and entrepreneur, C.C. Lane, petitioned the legislature to make changes to the Gold Mining Ordinance of 1865 governing property rights for miners. Lane wanted the mining laws of British Columbia to be more similar to the liberal laws of the Dominion of Canada and the United States of America. Lane argued that placer mining had drained the majority of alluvial gold deposits and that it was important to import new quartz mining technology to assist the flagging gold mining industry. Quartz mining required capital investment, which he stated the present mining law discouraged, since mining claims were held by possessory title only; thus, they were insecure. Lane asserted that if mining claims were held in fee simple, as offered by the Dominion and the United States "...mining men from San Francisco, London and other mining markets would come to British Columbia to buy mining properties." 

At the opening of the legislative session of 1873 Premier De Cosmos promised a change to the mining law of the province. In the early days of the session R. Smith (Yale-Lytton) moved that a select committee be appointed to consider this proposition, and a committee headed by A.R. Robertson (Esquimalt) was duly appointed. Lane's petition to the legislature clearly influenced the committee, and it offered a bill that recommended that the

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42 Lane, *Mining Laws*, p. 12.

43 The Second Session of the First Parliament opened 16 December 1872 with the McCreight (Victoria City) ministry in power. A vote of confidence motioned by T.B. Humphreys (Lillooet) brought about the demise of this ministry and a new ministry led by A. De Cosmos (Victoria District) opened the session for all intents and purposes 6 January 1873.
purchase system replace the leasing system. This piece of instrumentalist legislation suited the capitalist but was potentially dangerous to the private miner since wealthy investors acquired the power to monopolize the industry by buying up the best mining properties. Cariboo representative G.A. Walkem, who normally supported measures designed to encourage industrial development, expressed his constituents' reservations about the permissive enactment. Walkem successfully amended the bill to suit the specific needs of the private miner. He added Clause 117 to the list of clauses from the Gold Mining Ordinance of 1867 repealed by the act, effectively removing a burdensome tax imposed on miners. He also amended the bill by adding Section 16 which allowed any electoral district to petition to have their district withdrawn from the operation of the act. The act passed as amended and the property rights of miners were changed in order to encourage new forms of mining activity in the province; however, the original bill as proposed by a non-mining region representative clearly revealed a close alliance between business leaders and legislators to the possible detriment of independent entrepreneurs.

Law as a means to offer favoured status to domestic producers and to encourage business ventures and new legislation about natural resource management are examples of the administrative policy of British Columbia's legislators. Successive administrations implemented these permissive

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44 Gold Mining Amendment Act, 1873, 36 Vic., c. 4. Section 8 of this act made the requirements for acquiring a Crown grant retroactive. If a miner, or company, had met the requirements prior to the act, the miner was eligible for a Crown grant. The Lane and Kurtz Cariboo Mining Co. received a four and one half mile Crown grant on the meadows of the Williams Creek area, some of the richest mining lands in the interior but still went bankrupt in 1875.

45 Legislative debates as reported in the Daily Standard 22 February 1873, p.3. and Victoria Daily Colonist 18 February 1873, p.3.

46 36 Vic., c. 4, sec. 2. Clause 117 had levied an annual $250 fee on miners for the right to water privileges.
measures despite the fact that they were led by politically opposed ministries. The De Cosmos (1873-74) and Walkem (1874-6, 1878-82) ministries were particularly progressive when it came to public works programs. The Smithe (1883-87) and Robson (1889-91) ministries made greater use of incorporation statutes than any previous administration, offering generous land grants to prospective transportation companies. De Cosmos and Walkem considered themselves "reformers," but Smithe labeled himself a conservative. Politicians of varying ideological hues pursued a similar policy of using legislation to promote economic expansion.

Summary

Colonial administrators instituted a county courts system that fulfilled the need for a local dispute resolution forum throughout British Columbia. In 1867 the County Courts Ordinance formalized the practice of the courts and established a standard for conduct that was intended to meet the legal service requirements of the colony. Fiscal restraints, however, demanded that the county courts system of British Columbia be a simplified version of the model English county courts. Quantitative data and literary evidence presented in the following chapters suggests that the inadequacies of the courts stemmed directly from their construction in the colonial period. Powerless magistrates and ambiguous procedures in the courts weakened the effectiveness of the court.

At Confederation elected representatives, newly endowed with administrative authority and eager to implement instrumentalist legislation to achieve their goal of economic development, set out to reform the courts. This political coalition formulated court reform as part of a broad administrative policy. Legislators wanted to acquire accountability from all components of the state
system and increase their serviceability to the public. Opponents to court reform proposals obstructed the implementation of legislators' plans and laboured to preserve a court structure and a way of life that they had established prior to Confederation. The struggle for administrative control of the courts concerned the utility of the justice system and it also influenced the state formation process in the province.
CHAPTER 3

COURT TRANSACTIONS IN THELYTTON AND NEW WESTMINSTER
COUNTY COURTS

Historical Sources and Methodology

In addition to making private law that fueled development, legislators were
interested in reforming governmental institutions that interfered with their
programs for economic expansion. Legislators identified the courts and its
officers as ill-suited to the legal needs of the commercial community. They
recognized that the courts should function as a dependable and predictable
arbitration mechanism to settle corporate and personal disputes. In an
economic system dependent on credit relationships, as was the case in
nineteenth-century British Columbia, creditors and parties to contracts needed to
be able to invoke state power to force negligent parties to meet their
commitments. In the 1870s and 1880s the inferior civil courts of the province
were not operating effectively, especially in the urban regions of Victoria and
New Westminster, and litigants were dissatisfied with an expensive and
dysfunctional justice system. British Columbia's legislators attempted to institute
court reform in order to ensure the effective dispatch of justice and to instill
confidence in the institution as a reliable dispute settlement forum.

To substantiate the thesis that court reform was part of a formula designed
to facilitate commercial expansion it is important to show that there were
measurable grievances with the operation of the court. Contemporary
newspapers indicate that litigants in the courts were dissatisfied with the
effectiveness and the costs of the courts. The records of the county courts provide another historical source. Plaint and Procedure Books registered all of the civil cases coming before the magistrates by litigants' names, cause of the action, amount sought, court fees, judgement and, less fully, the success of the court to execute its judgements. This record is suitable for systematic study by quantitative methods using simple computer software. The Bench Books also illuminate the magistrates' jurisprudence and the procedure of nineteenth-century courts. These records provide commentary on the courtroom action in certain cases selected by the magistrates. In this chapter the Bench Books are used in conjunction with quantitative data generated from the Plaint and Procedure Books to evaluate the utility of the court. An historical analysis of literary sources and court records reveals three weaknesses of the courts system in the 1870s: accessibility to the courts, expense for litigants, and accountability for court orders issued by the magistrates.

The first decision in the research procedure entailed selecting county courts whose Plaint and Procedure Books were to be entered into a computer database. The records of the Lytton and New Westminster County Courts, both of which were in the New Westminster Judicial district, were among the most extensive of the county court records held at the British Columbia Archives and Records Service. Peter O'Reilly's Bench Books complemented the Plaint and Procedure Books from these courts, and, together, they presented a well-documented historical subject for study. Additionally, literary sources suggested that the New Westminster Judicial district might be a suitable focal point for an investigation of the weaknesses of the court. Public dissatisfaction with the court erupted after 1875 when the resident magistrate, A.T. Bushby, died and
was not replaced. Furthermore, the two courts represented examples of an "urban" (New Westminster) and a "rural" (Lytton) county court and offered the opportunity for comparative analysis.

To measure the competency of the magistrates the records from Plaint and Procedure Books were entered in computer databases using spreadsheet software. This software allows a researcher to replicate and manage a series of multiple entry records. Two databases form the basis for the quantitative analysis conducted in this study (see Appendix A). One database contains the records from the Lytton court spanning the period August 1871 to December 1880 and holds 74 civil cases (see Appendix B). A second database contains the records from the New Westminster court spanning the years January 1871 to December 1880 and holds 1237 cases. The time frame represents the period extending from the year of Confederation to the replacement of the lay magistrates by professionally-trained judges.

In order to use the database technique it was necessary to classify the types of cases coming before the courts. Eight categories are directly comparable between the two courts:

- **accounts rendered**: merchant trader seeking payment on credit account
- **negotiable instruments**: promissory notes, money orders, bills of exchange
- **goods**: non-commercial seller seeking payment on goods sold
- **services**: professional (lawyer, doctor, musician, etc.) seeking payment for services provided
- **wages**: non-professional (farm labourer, fisherman, teamster, etc.) seeking payment for labour performed
rent: landlord seeking rent from tenant

damages: individual seeking court ordered payment from defendant on liability for loss

non-applicable: a broad range of cases, including lack of information (20 examples in the NW court) to cases heard on appeal (5 examples in the NW court)

Describing the cases in the New Westminster court it was necessary to add five additional categories:

judgement summons: second hearing of a trial to execute payment on a previous court order

garnishee summons: judgement creditor seeking court ordered payment of debt owed by third party to a judgement debtor

money loaned: currency advanced on credit

interpleader: two parties seeking a court settlement on an issue involving a third party

replevin: party seeking court ordered return of a disputed piece of property

The study employed traditional historical research techniques involving an extensive examination of literary sources as well as quantification of other records in order to provide a complete explanation for the need for court reform in nineteenth-century British Columbia.

Quantitative and Descriptive Analysis of Decisions Rendered in the County Courts

For the great majority of civil actions in the county courts the court transaction was a simple procedure. A plaintiff entered a plaint through the agency of the court registrar. Once served with a summons, the defendant could
pay the debt, settle out of court, confess judgement, or defend the case. 20.1% of all cases in the Lytton court and 18.9% of all cases in the New Westminster (NW) court did not require a magisterial decree because the debt was paid out of court or a settlement was reached (Tables 1 and 2).

Table 1.
Resolution of actions brought in the Lytton County Court, 1871-80

<table>
<thead>
<tr>
<th>General Decision</th>
<th>Specific Decision</th>
<th>Number</th>
<th>% of Total</th>
<th>Debt Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) no decision by magistrat</td>
<td>satisfied/paid</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>settled out of court</td>
<td>15</td>
<td>20.1</td>
<td>15</td>
</tr>
<tr>
<td>2) action decided summarily</td>
<td>default</td>
<td>6</td>
<td>8.1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>debt confessed</td>
<td>9</td>
<td>12.2</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>struck out</td>
<td>6</td>
<td>8.1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>withdrawn</td>
<td>7</td>
<td>9.5</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>adjourned</td>
<td>5</td>
<td>6.8</td>
<td>0</td>
</tr>
<tr>
<td>3) decision by magistrat for plaintiff</td>
<td></td>
<td>20</td>
<td>27.1</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>for defendant</td>
<td>6</td>
<td>8.1</td>
<td>0</td>
</tr>
<tr>
<td>grand totals</td>
<td></td>
<td>74</td>
<td>100</td>
<td>34</td>
</tr>
</tbody>
</table>

Table 2.
Resolution of actions brought in the NW County Court, 1871-80

<table>
<thead>
<tr>
<th>General Decision</th>
<th>Specific Decision</th>
<th>Number</th>
<th>% of Total</th>
<th>Debt Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) no decision by magistrat</td>
<td>satisfied/paid</td>
<td>112</td>
<td>9.1</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>settled out of court</td>
<td>123</td>
<td>9.9</td>
<td>123</td>
</tr>
<tr>
<td>2) action decided summarily</td>
<td>default</td>
<td>136</td>
<td>10.9</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>debt confessed</td>
<td>299</td>
<td>24.2</td>
<td>102</td>
</tr>
<tr>
<td></td>
<td>struck out</td>
<td>95</td>
<td>7.7</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>withdrawn</td>
<td>90</td>
<td>7.3</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>adjourned</td>
<td>32</td>
<td>2.6</td>
<td>1</td>
</tr>
<tr>
<td>3) decision by magistrat for plaintiff</td>
<td></td>
<td>320</td>
<td>25.9</td>
<td>120</td>
</tr>
<tr>
<td></td>
<td>for defendant</td>
<td>30</td>
<td>2.4</td>
<td>0</td>
</tr>
<tr>
<td>grand totals</td>
<td></td>
<td>1237</td>
<td>100</td>
<td>498</td>
</tr>
</tbody>
</table>

Another 44.7% of cases in the Lytton court and 52.8% in the New Westminster court were decided summarily for the following reasons:
1. the defendant confessed judgement
2. the plaintiff won the case by default
3. the magistrate struck out the case
4. the plaintiff withdrew the case
5. the case was adjourned.¹

The remainder of the cases, 35.2% in the Lytton court and 28.3% of the cases in the New Westminster court, were adjudicated by the magistrate in favour of either the plaintiff or the defendant. In these cases the magistrate at Lytton awarded the verdict to the plaintiff in 20 out of 26 cases (76.9%) and at New Westminster in 320 out of 350 cases (91.4%). Irrespective of the complexity of the cases, the decision of the magistrate was fairly predictable.

Court transactions were non-technical and informal. The process of confessing judgement was so simplified that a form document was used by the court to record this transaction. The issues in cases rarely involved reference to statutes, and local statutes required little or no enforcement in the courts. Another indication that procedure was simple was the willingness of legislators to broaden the number of functionaries who were permitted to administer the various duties of the court. Clerks and registrars entered judgements in suits where the debt was confessed or paid. Clerks acted in the double capacity as sheriffs or high bailiffs and represented clients as advocates. In late-nineteenth-century British Columbia, court officers with imprecise responsibilities staffed the tribunals, and ad hoc procedures constituted the practice of the county courts.

¹In cases of adjournment it was the intention of the court to hear the case at a later date. For whatever reason unknown, possibly settlement out of court or poor record keeping, some cases were adjourned and not heard at a later date.
The administration of justice by lay magistrates required simple court procedures, and the court developed into a court of fact and not of law. Pleadings were oral and litigants often presented their own cases. In other cases suitors hired the services of non-professional lawyers to act as their agents, a situation made possible by a local statute. Generally, these agents were persons familiar with the practices of the court. The New Westminster court clerks, J. Morrison and H.V. Edmonds, were the most frequent agents in the court. F. Hussey and J. Tait, clerks of the Lytton court, were regular agents in that court. Other individuals hired the services of professional lawyers from Victoria. Suitors such as merchant traders and petty businessmen who regularly brought actions to the courts were most likely to take the services of professional lawyers. These individuals expected to win their suits and recognized that attorney's fees would be levied against the defendant in the event of a favourable court decree. Cases were argued with minimal reference to legal precedents, hinged upon convincing evidence and had predictable results.

**Typical Cases in the County Courts**

A description of nine cases heard at New Westminster and Lytton will illustrate the nature of court transactions in the county courts. Typical cases from the major groups of cases coming before the court are represented in this sample (see Tables 3 and 4). The survey of standard cases first describes cases that were found in both courts and then proceeds to outline cases found solely in the New Westminster court.

The most common cases in the Lytton and New Westminster courts were brought by merchant traders against regular customers to render accounts

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2The County Courts Practitioners Act, 1873, 36 Vic., c. 41.
Table 3.
Description of actions in the Lytton County Court, 1871-80

<table>
<thead>
<tr>
<th>Action</th>
<th># of cases</th>
<th>% of Total</th>
<th>Average Claim</th>
<th>Average Court Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>account rendered</td>
<td>27</td>
<td>36.5</td>
<td>$161.05</td>
<td>$10.41</td>
</tr>
<tr>
<td>notes</td>
<td>14</td>
<td>18.9</td>
<td>$181.78</td>
<td>$12.33</td>
</tr>
<tr>
<td>goods</td>
<td>3</td>
<td>4.1</td>
<td>$211.47</td>
<td>$26.06</td>
</tr>
<tr>
<td>services</td>
<td>8</td>
<td>10.8</td>
<td>$93.59</td>
<td>$4.92</td>
</tr>
<tr>
<td>wages</td>
<td>8</td>
<td>10.8</td>
<td>$85.83</td>
<td>$8.93</td>
</tr>
<tr>
<td>rent</td>
<td>2</td>
<td>2.7</td>
<td>$50.00</td>
<td>$4.30</td>
</tr>
<tr>
<td>damages</td>
<td>7</td>
<td>9.5</td>
<td>$217.24</td>
<td>$31.22</td>
</tr>
<tr>
<td>N/A</td>
<td>5</td>
<td>6.7</td>
<td>$210.01</td>
<td>$8.13</td>
</tr>
<tr>
<td></td>
<td>74</td>
<td>100</td>
<td>$151.37</td>
<td>$13.28</td>
</tr>
</tbody>
</table>

Table 4.
Description of actions in the NW County Court, 1871-80

<table>
<thead>
<tr>
<th>Action</th>
<th># of cases</th>
<th>% of Total</th>
<th>Average Claim</th>
<th>Average Court Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>account rendered</td>
<td>485</td>
<td>39.4</td>
<td>$56.47</td>
<td>$9.71</td>
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<tr>
<td>notes</td>
<td>154</td>
<td>12.4</td>
<td>$119.18</td>
<td>$13.17</td>
</tr>
<tr>
<td>goods</td>
<td>101</td>
<td>8.2</td>
<td>$66.33</td>
<td>$9.71</td>
</tr>
<tr>
<td>services</td>
<td>118</td>
<td>9.5</td>
<td>$70.40</td>
<td>$10.79</td>
</tr>
<tr>
<td>wages</td>
<td>83</td>
<td>6.6</td>
<td>$55.66</td>
<td>$10.74</td>
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<tr>
<td>rent</td>
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<tr>
<td>damages</td>
<td>18</td>
<td>1.5</td>
<td>$155.61</td>
<td>$19.85</td>
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<tr>
<td>judgement summons</td>
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<td>11.8</td>
<td>$87.55</td>
<td>$6.39</td>
</tr>
<tr>
<td>N/A</td>
<td>47</td>
<td>3.7</td>
<td>$85.43</td>
<td>$10.69</td>
</tr>
<tr>
<td>garnishee summons</td>
<td>23</td>
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<td>$73.84</td>
<td>$5.13</td>
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<td>money loaned</td>
<td>28</td>
<td>2.3</td>
<td>$72.54</td>
<td>$10.20</td>
</tr>
<tr>
<td>interpleader</td>
<td>6</td>
<td>0.5</td>
<td>-</td>
<td>$11.00</td>
</tr>
<tr>
<td>replevin</td>
<td>3</td>
<td>0.2</td>
<td>$183.33</td>
<td>$26.00</td>
</tr>
<tr>
<td></td>
<td>1237</td>
<td>100</td>
<td>$84.09</td>
<td>$11.08</td>
</tr>
</tbody>
</table>

payable. In between pay periods and seasonal harvests most pioneering settlers depended upon established traders for goods on credit, and merchants conducted a good portion of their trade in this manner rather than upon a cash-and-carry basis. This commercial arrangement resulted in traders using the
courts regularly to render credit accounts extended over a period of time. In the ten year period, 1871-1880, five merchant traders brought 307 suits (24.8% of the total 1237) before the New Westminster court and received a favourable decree in a remarkable 255 cases (83.2%).

The Lytton court did not see prominent traders bring successive actions in the manner witnessed in New Westminster. William McWha, a substantial merchant in the early 1870s, brought seven actions to the Lytton court to settle accounts. But McWha's pre-eminence as a merchant trader waned, and he was forced to file for insolvency in the New Westminster court in the late 1870s. Royal City merchants exerted economic power up the Fraser valley and acted as creditors to upriver settlers as well as to the people of New Westminster city. The traders of New Westminster depended upon the justice system to ensure that there was an effective mechanism to force payment on their accounts extended throughout the expansive judicial district of New Westminster and between districts as well.

A merchant trader initiated a suit by entering a plaint with the court registrar. The sheriff, or an appointed individual, would serve the summons and the defendant would have a number of choices: pay the debt, confess judgement, or answer the summons in court. 240 of the 485 cases (49.5%) brought by merchant traders before the New Westminster court in the ten year period, 1871-1880, were paid or the debt was confessed prior to the hearing. The remainder proceeded much like Gold v. Wright, adjudicated by Magistrate

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3 The major traders were: James Cunningham (M.P.P. for N.W. City), Major, Passard & Clute Co., S. Wise, G.L. Webster, and Holbrook, Fisher Co. (Henry Holbrook, M.P.P. for N.W. City and salmon-canning industrialist).
O'Reilly on 21 August 1878 in the New Westminster court. Louis Gold, represented by J. Morrison, sued Robert Wright for the balance of an account totaling $10.62. Gold produced a bill of particulars to verify the account. He claimed that the defendant did not dispute the account but had defaulted on his agreement to pay the account in wood. Morrison called a witness, Cohen, who swore that he had had a conversation with Wright and that the defendant had said he would pay the account when he was able. This witness evidently established the intent of the defendant to pay and, consequently, his acknowledgment of the debt. The witness was not cross-examined. Norman Bole, a barrister, represented the defendant and examined his client who insisted that the account had been settled as standing at $4.00, which Wright had agreed to pay in wood. According to Wright, he had presented Gold with a bundle of wood, but Gold had refused to give him a fair price on the wood. Wright added that he had never promised to pay. This was the extent of the testimony and at this point O'Reilly pronounced his decision for the plaintiff for $10.62. Following the custom of the court, the costs, totaling $17.75, were awarded to the plaintiff, meaning that the defendant was assessed the costs in addition to the judgement. Actions brought by traders to render accounts were treated in a perfunctory manner, and a bill of particulars presented by a trader was generally enough to assure a decree for the plaintiff.

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4All cases will be sited as follows: by the plaint number in the Plaint and Procedure (P & P) Books and the year of the case. Followed by a reference to a citation in a Bench Book, if applicable. Hence Gold v. Wright, 78/(18)78 P & P Books NW. GR 1705. O'Reilly Bench Book, 1877-79, GR 1727, v. 52 (not paginated). BCARS.

5The costs were as follows: $1.00 summons, $1.25 service, $3.00 extra service (the summons was served outside the NW court jurisdiction), $1.00 hearing fee, $1.50 witness fee, $3.00 judgement fee, $5.00 attorney fee and $2.00 agent's expenses.
Most elements of this case are representative of similar circumstances found in other actions brought by merchant traders. Gold was not a major trader, but he did bring twenty-six cases before the New Westminster court to render accounts payable. Gold chased this petty debt through the court system despite the fact that this action had been adjourned on a previous occasion and struck out at a second hearing. The amount of the action was fairly low compared to the average sums sought in these cases (see Table 4), but the ultimate decree of the court was typical of the county court. The case also reveals the court's attitude about due consideration for conflicting testimony and the precarious state of defendants' equitable rights. Wright clearly felt that he had a legitimate defence when he claimed that Gold had not given him a "fair" deal on the wood offered to settle the account. Defendants hired the services of lawyers less frequently than plaintiffs, and this aspect of the case is not representative of this class of suits. Wright hired Norman Bole because he believed that he had a legitimate case. Despite the advocacy of a professional lawyer, Wright still lost the suit. In addition to other similarities to most merchant traders' suits, this case exposes the weakness of the court to execute its orders. Wright neglected to pay the amount ordered by the court. Gold v. Wright came before the court as a judgement summons case in November 1878.

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7 70/78 P & P Books, NW. GR 1705. The term "struck out" means that the magistrate dismissed the case before the hearing based on technical grounds, e.g. a summons filed incorrectly.
8 143/78 P & P Books, NW. GR 1705. Judgement summons for $28.57. No appearance by the judgement debtor, judgement for the plaintiff and defendant committed to 30 days in jail for contempt. Actions to execute court orders, to be discussed below, were a prominent problem in the county courts. Plaintiffs were forced to chase debts through the courts because defendants failed to comply with orders of the court.
Suits to force payment on the various forms of negotiable instruments were handled in an expedient manner as well. *McWha and Alendine v. Arthurs Bros.* was brought in the New Westminster court in 1876 to force payment on a promissory note of $282.94 and presents an example of quick and mechanical justice. The defendants did not appear, but according to the practice of the court, the action proceeded as if they were present. H.V. Edmonds, a court registrar/sheriff/agent, was sworn, and he claimed that he had shown the note to the defendants who had acknowledged the signature. Begbie awarded to the plaintiffs the judgement, interest on the note, and costs totaling $27.48. The magistrate ordered that the defendant pay the debt on a negotiable instrument in 141 of the 154 cases (91.6%) in the New Westminster court and in all 14 actions involving notes in the Lytton court. In an era before the universal circulation of state-issued paper currency the courts functioned as an institution to ensure the negotiability of standard forms of exchange. These judgements reinforced the economic power of creditors, and indirectly, the social stratification of British Columbia.

Private individuals commonly sued one another to recover payment for commodities or services sold on the basis of future payment. Actions for goods and services pitted litigants of a similar social standing against one another. In order to win a suit the courts required proof of a transfer and an agreement on payment terms. If sufficient evidence was provided, as in *French v. Sullivan,* the

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10It must be remembered that Justices of the Supreme Court could act in the capacity of "County Court Judge," by the operation of local statute, 34 Vic., c.95. sec. 9.
judgement was invariably for the plaintiff.\textsuperscript{11} In cases where the goods or service were of questionable value, as in \textit{Uren v. McLennan}, the magistrate might exercise his judgement and rule for the defendant.\textsuperscript{12} The magistrate sought to discover if there was a direct or implied contract and adjudicated according to the facts presented. In \textit{Uren v. McLennan}, heard in the New Westminster court in 1880, O'Reilly made a subjective judgement about the fairness of the contract. The decree for the defendant, in such a case, provided a measure of protection against fraud for unwary contractors. In the broader context of standardized marketplace contracts, this type of "justice's justice" was not attractive to commercial interests. The formula used by nineteenth-century judges to assess the terms of a contract was "buyer beware,"\textsuperscript{13} and the "fairness" of a contract, even in cases involving usurious interest,\textsuperscript{14} was the contracting parties' concern. Standard business practices, e.g., a recognized symbol designating a commodity's material quality, cemented a binding agreement, but as long as a sale of a good or service was not fraudulent it was the custom of North American courts to enforce the specific performance of a contractual agreement. The

\footnotesize{\textsuperscript{11}516/80 P & P Books, NW, GR 1705. O'Reilly Bench Book 1879-80. GR 1727, v.47, p.292. The suit was for a meat bill of $26.16. Mrs. Sullivan, represented by W.D. Ferris (a Justice of the Peace, but not a lawyer), claimed that the debt was truthfully owed by her dead husband, from whom she had been separated. The judgement was for the plaintiff; however, no reasons were given. The Married Women's Property Act, 1873 36 Vic., c.22, [Discussed by Paulette Falcon, "...if the evil ever occurs." The 1873 Married Women's Property Act: Law, Property and Gender Relations in Nineteenth-Century British Columbia." (M.A.: University of British Columbia, 1991)] was not sited as a statute that protected creditors from the defendant's argument. This statute clearly stated that husband and wife were equally responsible for each others' debts, except in cases where the property in question, such as a dowry, was property independently owned by the wife.  
\textsuperscript{12}473/80, P & P Books, NW, GR 1705. Uren sued McLennan for $75.00, the value of teaching the defendant how to make soda water.  
\textsuperscript{14}Bakken, Rocky Mountain Law, p.51. Some western U.S. territories recognized any rate of interest stipulated in writing.}
county courts of British Columbia failed to provide a predictable contract management agency. In certain cases, the magistrate of the court exercised his arbitrary power and issued a court decree that operatively eroded the establishment of standard business practices.

Actions to recover wages reveal that the courts did not provide equal consideration for all suitors and did not level the playing field for suitors of different social classes. In general, litigants suing for wages were from a lower socio-economic class than their employers, and how they fared in the courts reflects a bias of the courts. Teamsters, farm labourers, fishermen and loggers all brought actions in the courts to sue their respective employers for unpaid wages. Most of the agreements between employees and employers were oral and were based on the customary pay scale offered by local employers. Disputes arose over the agreed-upon terms of the contract and turned on the word of employees against that of their employers.

*Jackman v. Fraser* reveals the bias of the courts to accept an employer's version of labour contract terms over those presented by an employee. A.C. Fraser and his brothers Simon and J. Fraser were prominent foresters in the lower Fraser valley, and they employed numerous individuals in all aspects of the timber industry. A. Jackman was hired as a teamster for the summer season in 1879. Jackman hired on with Fraser's outfit with no agreement to wages. After working 25 days he had fallen ill and quit. He sued in the court for $86.00 in unpaid wages, reckoned at $90.00 a month. At the trial Jackman represented himself and testified that he had worked all over Puget Sound and British

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Columbia as a teamster. He claimed that the customary wage was $75.00-90.00 a month and that there was no obligation to give notice when quitting the employ of a timber boss. Three witnesses for the plaintiff corroborated his estimation of the monthly wage; however, only two agreed that no notice when quitting was customary. Defending himself, Fraser charged that Jackman's hasty exit left eight men idle and cost his operation $65.00, but he agreed to credit Jackman with wages at $80.00 a month. Three witnesses for the defence (two of the witnesses were Fraser's employees) contradicted Jackman's testimony and imputed that Jackman had falsely claimed illness. O'Reilly's judgement for the plaintiff awarded wages for 25 days estimated at $80.00 a month minus $25.00 for damages. Jackman received $51.88 and likely paid the $7.25 in court fees.

A number of peculiarities in the judicial decisions rendered in suits for wages suggest that the court handled this type of action differently than those brought by merchant traders. Judgements for the plaintiff that awarded a fraction of the amount claimed were not typical of commercial cases brought in the Lytton and New Westminster courts, and yet partial awards were common in suits for wages.\textsuperscript{16} Actions to recover wages were riskier propositions than other actions entered in the court and less likely to provide total satisfaction for the plaintiff. \textit{Jackman v. Fraser} reveals that the magistrate accepted the employer's estimation of a monthly wage. Furthermore, in this suit, O'Reilly assessed damages against the plaintiff that the defendant had not formally entered as a counter-claim (set-off). Fraser's court-room testimony proved more influential

\textsuperscript{16}\small{In the Lytton court two of four judgements for the plaintiffs in actions for wages were partial judgements. In the NW court, eight of thirty-three decisions for plaintiffs suing for wages were partial judgements (24.3%), while 40 of the 391 (10.2%) total decisions for the plaintiff were partial judgements. Suits for damages were the other significant group in which the magistrate might award only partial judgement.}
than Jackman's. Due to the nature of labour contracts, which were oral and based on common practice, the magistrate's decision was bound to be somewhat arbitrary. That the magistrate tended to give more credence to an employer's version of events than an employee's would seem to indicate that persons with social status and economic power were treated more deferentially than their social lessors.

The statistics from the New Westminster court also indicate that the customary practice of the courts in suits to recover wages operated against minority groups.17 The most common suit brought by natives in the court was to recover wages. Natives entered 23 cases in the New Westminster court, and 20 were for wages. They received a favourable decree in only seven cases. In contrast, ten were struck out on technical grounds, seemingly indicating that their lack of success in the courts stemmed from their unfamiliarity with the formal processes of court procedure. Although Chinese litigants only sued on two occasions for wages, only one of these cases was successful. The majority of actions entered by Chinese litigants involved suits against a fellow Chinese. Merchant traders and money lenders from the Chinese community used the courts to force compliance on contractual agreements much like their white counter-parts. The typical cases brought by Chinese against one another reinforces the image of the Chinese community as an insular fragment of society. In addition, the statistics from the New Westminster court concerning

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17 David R. Williams, *The Man for a New Country*..."Towards the Indians Begbie behaved as a benevolent and affectionate patriarch, towards the Chinese as a patrician, but for thirty-five years he was their best friend in high places." p.128. Williams suggests that natives and Chinese received favourable and equitable treatment from Begbie. Evidence presented here indicates a need to re-evaluate Williams' hagiographic depiction of Begbie and the early judges.
wages, which were the most common type of suit brought by minority groups, suggest that the class bias of the court also translated into a racial bias.

Actions for damages were another significant type of suit brought in both the Lytton and New Westminster courts. This category of suits included actions to recover damages in disputes ranging from breach of contract to disagreements over water rights. In these suits the inadequacy of the court is further evidenced. The magistrates were vigilant in their effort to block individuals from using the courts as a venue to pursue fraudulent or vexatious claims for damages. The burden of proof was on the plaintiff to show the extent of the "damages." Here the quantitative analysis reveals that decisions awarding partial judgement were common and that there were a proportionally greater number of decisions against the plaintiff than in actions to recover wages. Of the seven suits for damages in the Lytton court, one was settled out of court, three awarded to the plaintiff (all partial awards) and two cases went against the plaintiff. In one other, the case was adjourned and no decision rendered. In the New Westminster court there were eighteen cases for damages, and the plaintiff received a favourable decree in only eleven instances (61.1%). Three verdicts for the plaintiff awarded partial judgement, and one of these partial judgements was a nominal award, perhaps indicating the magistrates' message to suitors not to pursue vexatious demands in the county courts.\[^{18}\] Seven judgements went against the plaintiff (38.9%). Actions to

\[^{18}\text{Betts v. Magee 445/77, action for $50.00 and $1.00 award(O'Reilly). In 1881 there were three instances of Judges giving nominal awards: Pooley v. Gill 603/81 action for $100.00 and $5.00 award(Crease); Greer v. Arthur 609/81, action for $490.00 and $5.00 award (Crease); and Smith v. Greer 742/81, action for $300.00 and award for one shilling (Begbie).}\]
recovery damages in the county courts were risky propositions that were unlikely to give satisfaction to aggrieved plaintiffs.

Why was the court so unreliable for plaintiffs in actions to recover damages? The customary practice of the courts was to favour plaintiffs over defendants, but in actions to recover damages decrees often went against plaintiffs. Certain of the claims were vexatious, which accounts for the magistrates' decision in perhaps four of the cases in the New Westminster court. The burden of proof required by the magistrate suggests another explanation for this irregularity. A plaintiff had to prove a material loss in order to recover damages. Actions for damages based on trespass on property, or some other reference to infringement on a legal right did not often prove successful. The magistrates' decisions in these suits discouraged parties from bringing causes for damages. Actions for damages reveal that the court was not set up to accommodate complex litigation based on fine points of law, and that the magistrates were opposed to the court becoming a venue for the settlement of neighbourly disputes.

**Differences between the courts**

The majority of actions brought in the rural and urban courts were directly comparable to one another. The same magistrates adjudicated cases in both the Lytton and New Westminster courts, and they followed similar administrative practices in each court. Court transactions and the outcome of cases pending in the courts were generally consistent throughout the province. When the description of actions are compared between the courts the significant differences are the number of cases heard in each court and the higher average amount of the suits brought in the Lytton court (see Tables 3 and 4). The New
Westminster court was a much busier court, and it served a much larger population. Royal City merchant traders used this court to process their claims against residents of New Westminster city, as well as against settlers from throughout the Fraser valley, and the number of suits they brought into the court contributed to the activity of the court. The difference in the amount of the claims is attributable to the greater sums sought by merchants in actions to render accounts in Lytton. It appears that Lytton merchants extended greater credit to their customers than their down-river contemporaries. Perhaps geography limited Lytton merchants' access to the courts on a regular basis. More likely the divergence in average amounts of the actions is attributable to the more infrequent sitting of the court. The Lytton court usually met two or three times a year, but in 1876, 1878, 1879 and 1880 the court met only once. The Victoria and the New Westminster County Courts met once a month allowing merchant traders to render their accounts more frequently.

Despite the infrequent sitting of the Lytton court, it seems to have been more successful in providing satisfaction to suitors than the New Westminster court. This significant difference between the courts is related to a combination of factors that reduced the efficiency of the New Westminster court. New Westminster was a much more substantial commercial center than Lytton and the legal service needs of the people using this court greatly surpassed those of Lytton residents. The paucity of legal business transacted in the Lytton court actually contributed to its success. The magistrate was able to use his authority in the small community to influence litigants to settle their disputes out of court. The magistrates in the "urban" court of New Westminster administered a broader variety of court cases, including execution orders, naturalization certificates,
insolvency actions (after 1875), and appellate decisions from the Justices of the Peace Court (after 1877). The inadequacy of the lay magistrates to administer the legal service needs of British Columbians was most evident in New Westminster city.

Part of the success of the Lytton court is attributable to the ability of the magistrates to influence out-of-court settlements. The term "settled out of court" is a deceptive description of cases resolved in this manner. The essential meaning of this description is that the magistrate did not make a formal order on the disposition of the claim, and payment of the disputed debt was not made through the agency of the court registrar. Otherwise the court procedure for out-of-court settlements was the same as for actions in which the magistrate passed a decree on the outcome of the trial. Plaintiffs used the pre-hearing court procedure to induce the defendant to meet his/her commitments. The registrar entered the plaint, and the sheriff served the summons in the customary manner. Often it appears the plaintiff and defendant met in the court before the magistrate. At this point in the trial action the informal nature of county court proceedings is evidenced. If the litigants could come to an agreement, perhaps with the assistance of the magistrate, the action was recorded as settled out of court.

An out-of-court settlement was a favourable resolution to a disputed debt for all parties involved. This type of agreement often meant that the litigants were able to reach an equitable arrangement about the disposition of the suit. The court records indicate that the debt in question was generally paid when an out-of-court settlement was reached. Court fees were considerably reduced in
actions settled in this manner as well.\textsuperscript{19} Moreover, there is no evidence to suggest that suits settled out of court came before the courts a second time to force compliance on an agreement.\textsuperscript{20} Suitors who could reach a settlement out of court used the courts as a venue to meet to discuss their dispute but did not use the formal court machinery to reach a settlement.

Miles Fairburn has suggested that out-of-court settlements were rare in frontier communities in New Zealand, and he has construed the absence of such agreements as one indication of loose social cohesion in Wellington, New Zealand.\textsuperscript{21} Tina Loo's examination of the colonial courts in British Columbia produces similar statistics about the rarity of out-of-court settlements.\textsuperscript{22} These historians suggest that there were no informal mechanisms for settling disputes because of the "bondlessness" of frontier communities. They argue that litigants turned to the courts as their only available recourse to settle disputes, and to illustrate their contention that litigants were bereft of other settlement mechanisms they cite the number of litigants who employed the full machinery of a trial hearing to resolve their disputes. Such a construction suits the theoretical framework which suggests that frontier societies were loosely organized communities and lacked networks of interpersonal relationships. However, it is difficult to support this hypothesis for British Columbia by using provincial court records.

\textsuperscript{19} Court fees for out of court settlements/ average court fees: Lytton- $7.36/ $13.28 and NW-$7.84/ $11.08.
\textsuperscript{20} The absence of execution actions to follow up out-of-court settlements may indicate that suits settled in this manner provided satisfaction to plaintiffs. Contrarily, plaintiffs may have forfeited the right to use the court procedure to execute a debt when they opted for an out-of-court settlement.
\textsuperscript{22} Tina Loo, "Law and Authority," p. 15, 137.
Proportionally more actions were settled out of court in the Lytton court (20.1%) than in the New Westminster court (9.8%) (see Tables 1 and 2). In the more economically developed and socially diversified district of New Westminster, out-of-court settlements were less common. One implication of the hypothesis advanced by Fairburn and Loo is that out-of-court settlements should have become more common with the development of social institutions and interpersonal relationships comparable to those found in more socially advanced communities. While out-of-court settlements increased annually over the course of the subject period in the Lytton court, this was not the case in New Westminster. As this practice in the Lytton court became more regular and familiar, more litigants found this method of dispute resolution satisfactory. In New Westminster, out-of-court settlements never developed as a common court practice, although a limited number of litigants turned to this form of dispute resolution throughout the subject period. Court records from post-Confederation British Columbia do not support the conclusion that out-of-court settlements are an useful measure of the social cohesiveness of a given community.

One explanation for these statistics may be that the more informal procedure of the Lytton court encouraged out-of-court settlements. Litigants in the Lytton court employed the services of attorneys and agents less frequently than their counter-parts in the New Westminster courts. Furthermore, the Lytton court served a community where litigants and the magistrates were on familiar terms. It appears that the magistrate assumed the position of "unofficial" arbiter.

2315 of 74 cases settled out of court before 1881 and 30 of 96 cases settled out of court, 1881-86.
and helped the litigants reach an agreement without following the formal proceedings of the court.\textsuperscript{24}

In contrast, the commercially developed region of New Westminster produced court business that was more extensive and diverse. Magistrates were responsible for court duties in addition to adjudicating disputes. They processed more naturalization certificates and actions in insolvency than the courts in the upper Fraser region. The magistrates of the County Court of New Westminster adjudicated more appellate cases from the Justices of the Peace's Court as well. Additionally, more than thirteen percent of the New Westminster court's business was with various forms of execution on court ordered debts: garnishee summonses, sheriff's executions and judgement summonses. More defendants failed to pay their court-ordered debts in New Westminster than Lytton, and litigants were forced to re-try their actions as execution orders. Execution actions amounted to an additional 171 cases in the New Westminster court over the ten year period. The magistrate of the New Westminster court was required to administer legal services demanded by a growing civilian population and commercial community. And execution orders placed an additional administrative burden on the magistrate whose work schedule did not allow him to act as an "unofficial" arbiter to assist litigants to "settle out of court."

The inability of the court to force debtors to meet their commitments displays the greatest weakness of the inferior court system in British Columbia.

\textsuperscript{24}William Wylie, "Arbiters of Commerce..." Writing about the two stage development of civil courts in Upper Canada in the late-eighteenth-century, where in the early period, 1789-1792, courts were served by lay, merchant traders as judges and later, 1792-1794, by English trained barristers-at-law, Wylie suggests that the success of the lay judges could be attributed to their local social standing and economic power which allowed them to influence out-of-court settlements in a more satisfactory manner than their replacements who relied on formal and stultified legal proceedings. pp. iv., 353.
Actions to execute previous court orders were a very important function of the courts, and the courts' success in these actions hinged on the authority of the court to force judgement debtors to pay their debts. A plaintiff resorted to an execution action when s/he had not received satisfaction on a magistrate's decree. The courts offered a number of alternatives to a suitor to force payment on a court-ordered debt. A judgement summons was the most simple (see Figure 1). The plaintiff re-entered the plaint introduced in the original action.

Figure 1.

Judgement summons in the New Westminster court

The second action was invariably for a larger amount since court fees awarded with judgement in the original hearing were added to the judgement summons. The judgement debtor was bound by law to respond to the summons, and the magistrate was empowered to commit a negligent debtor to prison for failure to respond to a judgement summons. The hearing was supposed to be an affirmation of the order to pay a debt, but it could become an arbitration forum. The magistrate might order easy payment terms as low as $2.00 a month on a
affirmation of the order to pay a debt, but it could become an arbitration forum. The magistrate might order easy payment terms as low as $2.00 a month on a judgement summons of $32.37. \textsuperscript{25} When Dennison \textit{v.} Budlong came up in court for a second time to re-affirm Budlong's debt on a promissory note for $500.00, the plaintiff accepted twenty cents on the dollar as payment. \textsuperscript{26} Garnishee summons allowed a plaintiff to extract payment from a third party. In this type of action the court ordered the appearance of an acknowledged debtor to the judgement debtor. Theoretically, the magistrate's duty was to order a transfer payment to the plaintiff in lieu of direct payment by the judgement debtor. These actions were less frequent than judgement summons and not very reliable. \textsuperscript{27} A third form of execution on an acknowledged debt was an execution summons, whereby the plaintiff sought a court order for a sheriff's auction of the judgement debtor's seizable possessions. \textsuperscript{28}

The frequency of actions to execute court orders varied province-wide. From 1871-80, there were 171 execution actions in the New Westminster court, and none in the Lytton court. These cases added to the magistrates' case-load, and the clerk of the court, who also acted as the sheriff, was required to administer summons outside of the court in addition to his courtroom duties. The statistics for the incidence of execution actions indicate that in at least 22.6\% of all actions awarded to the plaintiff in the New Westminster court the

\textsuperscript{25} Cunningham \textit{v.} Hall 232/75, P\&P Books, NW, GR 1705.  
\textsuperscript{26} 91/78, P\&P Books, NW, GR 1705.  
\textsuperscript{27} The decision in 15 of 23 cases went against the plaintiff. For a success rate of 34.8\%.  
\textsuperscript{28} The Homestead Act, 1873, 36 Vic., c. 38 protected a settler's homestead property and $500 of personal property from seizure for debt. Execution Summons were an unusual assignment of the New Westminster court. There are only two recorded cases in the Plaint & Procedure Books from New Westminster (1871-1880). One was successful and the other struck out on a nulla bond.
defendant neglected to pay the court-ordered debt. More than one-in-five debtors flouted the order of the New Westminster court. The court's inability to assure the execution of its orders jeopardized the authority of this state institution.

Certain plaintiffs re-entered summons on multiple occasions, essentially chasing bad debts through the unreliable agency of the court. James Cunningham, a New Westminster merchant trader and salmon-canning operator, brought an action against S.F. Holt in February 1879 to render an account payable for $79.55. Holt confessed the debt in court, and Magistrate O'Reilly ordered that he pay the debt and $16.33 in court fees in $5.00 installments for four months and successive $10.00 installments until paid. No payment was made into court the day of the hearing. In May 1879 Cunningham attempted to procure a court-ordered settlement from a garnishee, F. Woodwork, for the sum of $95.88. This action was withdrawn, perhaps due to the non-appearance of the garnishee. However, an additional $6.50 in court fees was added to the already burgeoning debt. Cunningham re-entered the plaint as a judgement summons in September 1879. The action was postponed at this court sitting and the next three court sessions in October, November and December. Eventually Cunningham withdrew the plaint in January 1880. In this case Cunningham actually received satisfaction on the debt, but not until October

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29 This percentage is reached by taking the total number execution actions: 171 [146 judgement summons, 23 garnishee summons, and 2 sheriff's execution (absorbed by the N/A category in Table 4)] and dividing it by the number of cases awarded to the plaintiff: 755 (320 judgements for the plaintiff, 136 cases awarded by default and 299 cases confessed by the debtor).
1884. Plaintiffs often chased debts through the courts for years and never received satisfaction.

Although the business of the Victoria County Court is outside the scope of this research project, evidence suggests that suitors there were also having trouble gaining satisfaction on debts through the agency of the county court. Table Five shows that an increasing number of judgement summons cases was an escalating problem in the Victoria County Court. Although the total number of plaints was not increasing, the total number of execution actions increased annually. The fact that the urban courts were less effective in giving justice to creditors than the rural courts suggests that the growing complexity of social organization in urban communities negatively affected the dispatch of justice by lay magistrates.

<table>
<thead>
<tr>
<th>Table 5. County court business before Magistrate Pemberton</th>
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<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>Number of plaints</td>
</tr>
<tr>
<td>Judgement summons</td>
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<tr>
<td>Garnishee summons</td>
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<tr>
<td>Interpleader</td>
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<tr>
<td>Execution summons</td>
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<td>Commitments to gaol</td>
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</table>

source: Victoria Daily Colonist, 3 March 1875

The absence of a resident magistrate in New Westminster after 1875 likely compounded the lack of authority wielded by the court. When Arthur T. Bushby, the New Westminster resident magistrate since Confederation, died in 1875,

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33 Actions to execute debts increased dramatically in frequency after Confederation. Tina Loo found that judgement summons cases occupied only 1.7% of the county court's business (p. 132) in the colonial period as compared to 13% of the New Westminster County Court's business.
Peter O'Reilly, a resident of Victoria and the magistrate appointed to Yale and the northern gold fields, assumed responsibility for court business in the Royal City. At first he coordinated his northern circuit courts so that he could handle the business of the New Westminster court as well. By 1877 he was making monthly excursions to the New Westminster district courts and had given up his former magisterial duties in Yale. Despite his full-time appointment in New Westminster, O'Reilly continued to reside in Victoria. These circumstances likely contributed to the ease with which judgement debtors escaped the long arm of the law.34

The inability of the court to force debtors to meet their commitments displays the greatest weakness of the inferior court system in British Columbia. The economic power of merchant traders and employers was reinforced by the practice of the court, but a court order had little real significance if the defendant failed to obey the court decree. Magistrates in the Lytton court were able to use their influence in the small community to encourage litigants to settle their disputes out of court. Suitors used the pre-hearing apparatus of the court to induce debtors to meet them in or out of court to settle their disputes. Defendants generally answered summons issued by the court, and plaintiffs received satisfaction on their debts through the mechanism of an informal court procedure. And yet, justice was certainly justices' justice. Defendants could not receive an appeal based on a point of fact. In most cases the magistrate's decision was final and incontrovertible. In the New Westminster court the same

34 Crease to Lash, Minister of Justice, 10 July 1877 Add MSS 54, file 12/66. BCARS. Justice Crease believed the absence of a resident magistrate accentuated the problem. Commenting on the need for a resident judge in New Westminster, Crease wrote that, "...debtors desirous of absoinding have every opportunity of escaping across the 49th parallel unmolested instead of being [subpoenaed] at Yale or Hope and the debt recovered." Folio 8430.
simple procedure prevailed, but there, even the beneficial aspects of informal "out-of-court" settlements were not available. More cases proceeded to a formal hearing by the magistrate and resulted in a court order issued by the magistrate. The more formal procedure at New Westminster suited a court where trained lawyers argued cases and the more fractured social relations of a larger community required a court instrument to settle disputes. The quantitative analysis of New Westminster court records reveals that the court there was not operating as effectively as the Lytton court. The abundance of actions to execute previous court orders indicates that debtors were flouting the authority of the magistrate. The court failed to fulfill its function in the community to regulate commercial transactions. This chapter has documented the need for court reform; the succeeding chapter outlines the proposals for reform offered by competing factions of the political elite of late-nineteenth-century British Columbia.
CHAPTER 4

COURT REFORM INITIATIVES IN BRITISH COLUMBIA, 1872-1878

Following Confederation, civil procedure reform in all courts of the province was an annual point of debate in the sessions of the local legislature, but few real changes could be implemented since Ottawa paid the costs of administering justice in the province.¹ The most significant court reform proposals during the sessions of the 1870s and 1880s were to replace the magistrates of the county courts with professionally-trained lawyers and to legislate more frequent circuits of the superior courts. Commercial interests and other lobby groups demanded both of these reforms, and they voiced a number of specific complaints about the administration of justice.² Miners and traders in the remote mining districts of Richfield, Cassiar and Kootenay wanted resident judges during designated times of the year, since the centralization of the justice system in Victoria created a situation where justice was not served efficiently enough by circuit courts.³

Furthermore, as an economy measure the semi-annual Assize (superior

¹As agreed in the 5th Article of Union. B.N.A. Acts 1867-1907 (Ottawa: Printed by C.H. Parmelee, 1913), p.78. Ottawa was unwilling to pay more for the administration of justice in the province of British Columbia. The federal government delayed acting on the province’s request for more judges by not making new appointments.
³“Grand Jury Report,” Cariboo Sentinel 30 July 1870, p.2. The foreman criticized unequal County Court fees throughout the province and requested a resident judge. “As it is, causes over $500 have to await the coming of court once a year, or pay the expense of taking the cause to Victoria.”; “The Judiciary,” Daily Standard 16 December 1873, p.2. Editor argued need for resident judges on the mainland to provide, “...more frequent courts, better employed justices, greater public utility...”; “Presentment of Grand Jury of the Cassiar District,” Daily Standard 2 October 1876, p.3. “Some judicial means should be taken to protect the interests the community, and to insure this, we strenuously urge that a County Court Judge shall reside in the district and hold circuit from the middle of October.”
criminal) and Nisi Prius (superior civil) Courts were reduced to an annual circuit in 1874. One result was that accused criminals languished in jail awaiting the commission of an Assize Court. On the mainland, litigants in civil actions over $500 had to await the commission of a Nisi Prius Court, or incur the expense of taking their plaints to Victoria to be entered by the court registrar. In some cases, plaintiffs preferred to accept the lower jurisdiction of the county courts and abandoned any excess over $500. Other superior court transactions, which included bankruptcy, probate, admiralty, exchequer, and chancery, were administered exclusively in Victoria. This situation was particularly significant since it meant that all insolvency cases and the administration of wills of deceased persons had to be conducted through the agency of the court registrar in Victoria. Another frequent complaint voiced throughout the province centered on the expense of the county courts. Members of the Incorporated Law Society of British Columbia complained that the lay magistrates were inefficient in the

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4Senator Clement F. Cornwall, to Z. Lash, Minister of Justice, March 1879, Add MSS 54, file 13/72, folio 9325. BCARS. Cornwall attributed the reduced schedule to the expense of circuit courts. He estimated the cost of a circuit at between $1200-1300, which seems reasonable since the average annual traveling expenses of the judges and registrars during the years, 1867-1870, was $2526.43. According to "Traveling expenses of judges and registrars on circuit during the following years, 1862-1870," Add MSS 54, file 14/82, folio 10088-9. BCARS. The average cost had been much higher, as high as $7058.73 in 1864, but it seems reasonable to assume that the cost stabilized at the figure quoted by Cornwall.

5As an extreme example, "Cassiar Report of the Grand Jury," Daily Standard 16 September 1879, p.3. In R. v. Thomas Anderson (1879), the accused had spent 18 months in jail by the time the court arrived and then Justice Gray was forced to postpone the hearing due to administrative negligence.


dispatch of court business and suggested that three legally trained men should replace the incumbents of the county court bench.  

Justice system administrators and community members who used the courts to arbitrate their commercial suits acknowledged the need for court reform. They argued that a reorganization of the entire justice system was not necessary and, moreover, they recognized that this was beyond the financial means of the province. However, as the lower mainland was becoming equal to the island in pre-eminence as an area of commerce and population, changes were required in the administration of justice in order to accommodate structural changes in society. Court reformers wanted to decentralize the justice system from geographically-remote Victoria. A more satisfactory method of executing court orders in the county courts and more efficient use of the judicial power available were also necessary.

Two powerful factions from the political and social elite of British Columbia offered substantially different formulas for restructuring the existing justice system. One group, composed of the Supreme Court Justices and Senators from British Columbia, advocated moderate changes to the administration of justice. Their reforms would have required further responsibilities of the Supreme Court Justices and eliminated the need for all of the incumbent County Court Magistrates. Another faction comprised of eastern Canadian immigrants to British Columbia supported personnel changes on the county court bench that would have introduced new, professionally-trained lawyers as judges. Both proposals aimed to maintain the existing jurisdictional division between the inferior and superior courts as inherited from England and copied in Ontario.

However, the first proposal was based on the premise that the judicial districts of the upper Fraser region and other outlying population centers did not demand, nor require, a formalized justice system that would be expensive to administer. The Supreme Court Justices wanted to "level up" the existing county court system by better utilizing the judicial power available. The most vociferous exponent of this position was Justice Crease, who laboured to preserve the dignity and independence of the Supreme Court bench. The competing faction had supporters in successive ministerial administrations. These would-be reformers shared common goals for the economic development of the province, and they identified the courts and the judges as obstacles to an expanding commercial system. Their proposals for reform contemplated much more significant changes to the administration of justice, and they sought to achieve their aims through iconoclastic and pernicious legislation. Their legislative mandates confronted the Supreme Court Justices with decisions about their willingness to abide by the law. And in their effort to replace the lay magistrates of the county court with lawyers they effectively created a justice system that could only be served by professionals.

Hamar Foster has described the debates over court reform in nineteenth-century British Columbia as a political struggle between appointed officials from the colonial period and newly elected representatives. Foster is very sympathetic to the arguments made by the former group for moderate changes to the administration of justice. He downplays the selfish concerns that

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9 Crease to Z. Lash, Deputy Minister of Justice, 9 September 1878. Add MSS 54, file 12/65, folio 8515-6. BCARS. Crease used the terms "leveling up" and "leveling down" to describe the needed reform in the inferior and superior courts.

10 Hamar Foster, "...Law and Politics in British Columbia," p. 211.

11 Ibid.
motivated the Justices to oppose civil procedure reform and instead makes a
defence of the Justices' constitutional grievances. And although he effectively
exposes Justice Crease as a prevaricator and a judge who betrayed his integrity
as an impartial arbiter by mixing in politics, 12 Foster does not pass critical
judgement on this sometimes unscrupulous gentleman. He does, however,
question the provincial legislators' legal acumen and ability to govern. 13
Foster's account of court reform in the years after Confederation tends to
indemnify the Justices for their obstructive behavior and lays blame for domestic
turmoil on obstreperous elected officials.

This examination of court reform suggests that legislators' proposals had
greater utility than the Justices' because the Justices' program for court reform
was inadequate. Crease wanted to provide the lower mainland and island with
professional judges, while perpetuating the existing system in the remainder of
the province. His program was based on the assessment that there was an
imbalance in legal service needs throughout the province. New Westminster
needed a legally-trained resident judge, and Crease believed the city deserved
one. Lytton, in Crease's mind, only required a semi-annual circuit court to serve
justice effectively. Further reducing the utility of Crease's reform proposal, he

I need not say [that] it wd. be "taboo" to discuss the subject beyond the precincts of the
Court and your Department at Ottawa or to break thro'- however indirectly- the
wholesome rule which without exception I have faithfully observed ever since my first
commission under Her M's hand in 1861 up to this day, namely not to write or dictate a
line to any of the newspapers on such subjects.
Foster later reveals that he found evidence in Crease's papers that he wrote anonymous and
falsely signed letters to the Victoria Daily Colonist, the Canada Law Times and the Canada Law
Journal.
13 See also Foster, "How not to Draft Legislation: Indian Land Claims, Government
Intransigence, and How Premier Walkem nearly Sold the Farm in 1874," The Advocate.
ignored communities where growth was imminent, such as Kamloops. These population centers also needed access to formalized local courts. The Justices wanted to retain certain of the lay magistrates of the county courts and the lay gold commissioners to adjudicate civil disputes on the periphery of white settlement. And they did not want to transfer any new jurisdictional powers to the officers of the lower court. This system would have perpetuated a situation where the isolated communities of the interior would not have had access to resident judges. Applications for insolvency actions and probate matters would have remained centralized in Victoria. In the final analysis, the Justices' reform measures were essentially obstructive to real change that was needed in British Columbia.

Provincial legislators used public utility as a benchmark for reform proposals, and they hoped to institute progressive changes to improve the administration of justice in all of British Columbia. This body engineered the statute law that regulated the administration of justice, and it was the impetus for change. Proposals that came from the Justices, the Incorporated Law Society and other sources influenced the local parliament, but this assembly constructed the legislation that actually changed the courts. Federal officials disallowed much of the legislation enacted by the local parliament to improve the justice system. This legislation is important, nevertheless, because it reveals British Columbia politicians' conception of how the administration of justice could have been improved.

The annual debates in the legislative assembly on the point of court reform help us to understand the historical process that resulted in reform of the courts of British Columbia. In each parliamentary session from 1872 to 1878 the
ministry in power prepared bills that contemplated reform of the courts of the province. The provenance and details of each of these bills are described in the following paragraphs. In some instances the Justices and their supporters offered counter-proposals to the bills drafted by the Attorney General. An analysis of the Justices' stated and hidden objections to the proposals forms part of the survey. This examination of court reform considers the social character and intellectual outlook of the major factions proffering reform proposals, the elements of these reform packages and the legal service needs of the community.

Legislation for the Better Administration of Justice

In the 1872 session of the British Columbia legislature, T.B. Humphreys (Lillooet) introduced a resolution to require that County Court Judges have professional training and that there be at least three judges. His proposition followed editorials in the contemporary newspapers arguing that British Columbia had good laws, but that the magistrates were the weak link in the administration of justice. One of these editorials supported the idea that professional judges conduct regular circuit courts once a month, and barring this proposition suggested that the current magistrates be pensioned and competent lay individuals handle the county court business on an on-call, fee basis. The people and of the new province were dissatisfied with the lay magistrates and demanded reform.

14 Legislative debates as reported in the Daily Standard 1 March 1872, p.3.
15 "County Court Judges," Daily Standard 10 February 1872, p.2.; "Justices of the Peace," Daily Standard 1 August 1872, p.2; The Official Staff and their Payment," Daily Standard 20 August 1872, p.2. Reports that Kootenay District with a population of 45 whites was served by five officials at an annual cost of $10,000. The editor of the paper, Amor De Cosmos, believed that a fee system would be less expensive.
Proposals to reform the courts focused on the judges for a number of practical reasons. The legal service requirements of British Columbia changed with the development of the country; however, the judges had remained a constant variable in the administration of justice. The benchers of the province in both the inferior and superior courts represented an enduring legacy from the colonial period, and reform of the courts inherently involved changes to the judiciary. Secondly, British Columbia legislators used the Ontario example of court reform as a guideline for their own reform proposals, and there, legislators had replaced lay magistrates when their serviceability had expired. During Upper Canada's formative years English-trained judges had handled superior court business and lay magistrates inferior court transactions. By 1859 the Upper Canadian legislative assembly had enacted statute law requiring professional training for County Court Judges. In 1864 on Vancouver Island Joseph Needham replaced the lay judge, David Cameron, also setting the precedent for superannuating lay judges. And thirdly, many of the complaints about the lay magistrates resulted from the fact that these gentlemen were overburdened with court business they were not trained to handle. As is shown in the following review of court reform legislation in the 1870s, administrators continued to increase the legal services required of the county court magistrates, effectively creating a system that could only be served by professionals.

16 An Act Respecting County Courts, Consolidated Statutes of Upper Canada (1859), 22 Vic., c. 25, sec. 2. (Toronto: Stewart Derbershire and George Desbarats, 1859). Stipulated County Court Judge's be of 5 years standing at the bar.

17 As examples, An Act to amend, "The Gold Mining Ordinance, 1867," by giving County Court Judges jurisdiction over the Mining Court, as constituted under the said Ordinance, and to declare the powers of the said County Court Judges, and to regulate the procedure in relation thereto, 1873, 36 Vic., c. 14; An Act Respecting Insolvency, 1875, Statutes of Canada 38 Vic., c. 16; An Act for giving Appeals from Convictions or Orders of the Justices of the Peace in certain cases to the County Court, 1877, 41 Vic., c.23.
British Columbia's legislators wanted to assure residents of western Canada the same recourse to justice available in eastern Canada and this included courts administered by professionally-trained judges.

The federal Civil List Act of Canada of 1872 presented a significant obstacle to replacing the incumbent magistrates. It legislated the salaries of civil servants, including the six Stipendiary Magistrates of British Columbia, and was beyond the jurisdiction of the provincial legislature to amend. In addition, the magistrates' contract stipulated that they could only be replaced or superannuated after suitable employment had been found for them in another public service capacity, or that they be retired with a two-thirds salary stipend. In 1872 when Amor De Cosmos (Victoria District)\(^\text{18}\) raised the issue of retiring the magistrates in the House of Commons, his proposal was met with stiff resistance.\(^\text{19}\) Minister of Justice Edward Blake commented on the expense of the administration of justice in British Columbia and Manitoba and added that if British Columbia had borne the cost internally there would have been less talk of superannuating the lay judges. Ottawa was not sympathetic to British Columbia's requests for court reform, and extant legislation stymied the way for change.

In spite of Ottawa's opposition to replacing the magistrates, the 1872 session of the British Columbia legislature passed a County Court Judges Simultaneously.

\(^{18}\)From 1872-1874, DeCosmos was a representative in the provincial and federal parliaments simultaneously.

\(^{19}\)"The Judges and Magistrates Bill," *Daily Standard* 26 June 1872, p.2. Reported that De Cosmos' queries about professional County Court Judges were met by Sir John A. Macdonald's response that the salaries had been fixed by Imperial Statute and no changes could be made in incumbencies. Macdonald added that Ontario had had non-professional County Court Judges until very recently. (Upper Canada legislated professional training for County Court Judges in 1859, see footnote 16, chapter 4, *infra*).
Appointment Act. This statute established the administrative machinery to replace the magistrates and authorized the Governor-General of Canada "from time to time, to appoint any fit and proper persons as and to be County Court Judges." The statute was fairly insignificant since no appointments were made, but it did address the issue of finding replacement magistrates and announced to Ottawa British Columbia's dissatisfaction with the status quo.

Statutory enactments of the legislature in the 1870s suggest that legislators wanted to make the recovery of small debts an easier process, despite the unwillingness of the Dominion to make personnel changes on the bench. Legislation confirmed the power of the magistrates to make orders of execution on debts and to issue writs of seizure for debt. This Act allayed doubts about the competency of the lay judges to issue writs of capias to imprison absconding debtors. The statute confirmed a standard practice of the courts in order to impress on the public the full authority of the magistrates. The Execution Against Lands Act, 1874, confirmed that magistrates of the county courts could enforce payment of debts by court-ordered seizure of lands. Other measures made it easier for plaintiffs to enter and argue their plaints.

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20 County Court Judge's Appointment Act, 1872, 35 Vic., c. 22. The preamble of this statute stated the right of British Columbia to legislate provincial courts as described in the B.N.A. Act, 1867, sec. 92.

21 An Ordinance to amend the County Court Ordinance, 1867, R.S.B.C. (1871), 34 Vic., c.126.

22 37 Vic., c. 23. This act did not interfere with the operation of another act, The Homestead Amendment Act, 1873, 36 Vic., c. 38, which protected settlers' homestead and personal property valued to $500 from seizure by debt.

23 The County Courts Practitioners Act, 1873, 35 Vic., c. 41. This act allowed any individual to act as an agent in the court, thus making it more simple to gain representation. Another example, Justices' of the Peace and Coroners Oaths Act, 1874, 36 Vic., c. 7. By broadening the number of persons eligible to take affidavits, which were necessary to enter a plaint in a court, this act made it easier for a litigants to sue.
Legislators employed another tactic in their effort to effect reform to the courts: they attempted to harass the incumbents with pernicious legislation. On 15 March 1873 H.M. Ball, the Stipendiary Magistrate for Cariboo, informed the Attorney General that he declined to fulfill the additional capacities adjoined to his colonial appointment without further remuneration to his $3400.00 salary.24 The commissions of the "County Court Judges" in the colonial period had authorized appointees to act in the capacity of County Court Judges, Gold Commissioners, Police Magistrates, Justices of the Peace, Assistant Commissioners of the Department of Lands and Works, Postmasters, Indian Agents, Collectors of Revenue and general government agents. Ball considered that these additional responsibilities were not part of his commission as a magistrate in the national era. The De Cosmos ministry responded to Magistrate Ball's insubordination with the County Courts Extension Act, 1873, which required the county courts magistrates to conduct the business of the mining courts without additional remuneration.25 The Act had little consequence. The magistrates of the county courts continued to handle civil and mining cases within their informal judicial districts, and Gold Commissioners adjudicated mining cases in the outlying mining districts of Cassiar and Kootenay.

24 "County Court Judges- opinion on their duties," 9 April 1873, in "BC Attorney General, 1864-1874, Opinion on various topics." file 12, BCARS. Assessing the issue in a historical perspective, Attorney General Walkem gave his opinion that Governor Musgrave had intended that the County Court Judges would continue to complete their colonial times' duties. When considering the small number of cases on the docket in the colonial period and in 1873, Walkem concluded, "I make these observations to show that Gov. Musgrave must have known these facts and must have felt that he was not justified in recommending the Dominion Government to take over the Stipendiary Magistrates in the sole capacity of County Court Judges at the large salaries paid to them." p. 7d.

25 An Act to amend "The Gold Mining Ordinance, 1867," by giving County Court Judges jurisdiction over the Mining Court, as constituted under the said Ordinance, and to declare the powers of the said County Court Judges, and to regulate the procedure in relation thereto, 1873, 36 Vic., c. 14.
Court Judges adjudicated criminal actions and larger civil suits during annual circuit courts. The County Courts Extension Act, 1873, did not change civil procedure in the county courts or the mining courts, but its intention was to legislate the authority of the local parliament to direct the duties of county court magistrates.26

To this point the superior court judges and the magistrates had not raised any formal objections to civil procedure legislation enacted by the legislature; however, the County Courts Extension Act of 1874 provoked a petition by the benchers of the inferior court addressed to the federal Minister of Justice. In the local parliament Attorney General Walkem presented the 1874 Bill to reform the county courts as a means for the provincial government to gain control over civil servants.27 The Bill authorized the Lieutenant-Governor in Council to appoint the times and places at which county courts would be held and to appoint the places of residence of the magistrates. Once again reformers contemplated legislation that harassed the magistrates. Certain of the magistrates did not reside in their districts, and they had no desire to change the location of their family homes. Speaking on the Bill, J.F. McCreight (Esquimalt) raised the objection that the magistrates were federally appointed officials and without the jurisdiction of the provincial legislature. Walkem responded that the administration of provincial courts was a local matter and British Columbia could not expect the Dominion government "to find food for the province [and] put the

26Another statute enacted during the 1872/73 session of the local legislature, An Act to amend the Courts Merger Ordinance, 1870, 36 Vic., c. 15, contemplated a similar declaration of legislative control over the administration of justice. This Act delegated the power to appoint Supreme Court registrars and deputy registrars to the Lieutenant-Governor in council. The power of appointment had formerly rested with the Justices.

27Legislative debates as reported in the Daily Standard 27 January 1874, p.3.
This Bill was intended to meet the public demand for more frequent court sittings and to discourage the magistrates from living outside of their Judicial Districts.

The voting division on a proposed amendment to this Bill indicates that a considerable majority of the Legislative Assembly supported Walkem's version of court reform. A.R. Robertson (Esquimalt) seconded by J.A. Mara (Kootenay) resolved that the Bill be referred to a select committee before the Assembly voted on its provisions. The representatives voted down the amendment by a vote of 5 yeas to 18 nays and the Bill went to a second and third reading that day passing both readings. The significance of the division was that Robertson and J.F. McCreight both voted for the amendment in opposition to the majority. These two individuals were prominent lawyers in the city of Victoria whose social standing and political sensibilities distinguished them from the majority of the legislators. And their opinions about court reform differed from the majority. Although there are few recorded divisions from the early sessions of the Parliament, the voting divisions on civil procedure legislation were consistent. The majority of legislators voted with the prevailing ministry of the day on this type of legislation, demonstrating that there was political consensus on the need for court reform.

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28 Ibid.
At the time of the County Courts Act, 1874, Magistrate O'Reilly was the real target of the legislation. His district comprised Yale and the northern gold mines, and yet he lived in Victoria. There was no residency clause in the County Court Ordinance of 1867 to require magistrates to live in their Judicial Districts, but there was precedent in English and Ontario statutes for legislating the place of residence for court officers. One of the English county courts Acts stipulated that the clerk of the court must reside within his appointed district,\(^\text{31}\) and the Ontario legislature enacted that the County Court Judge must reside in his appointed district.\(^\text{32}\) Attorney General Walkem and the majority of legislators voting for this section of the Bill believed that resident judges would better serve the legal needs of the community. Since the magistrates continued to exercise administrative duties as general government agents in addition to their court duties, a residency clause would also have increased their serviceability to the central government in Victoria.\(^\text{33}\) The stipulation was designed to provide the public with regular court sittings and to maximize the efficiency of the available civil staff.

The magistrates of the county courts resisted the order to reside in designated districts. They wrote a jointly signed protest to the Minister of Justice outlining their objections to the enactment suggesting that it


\(^{32}\)An Act Respecting County Courts, \textit{Consolidated Statutes of Upper Canada} (1859), 22 Vic., c. 25, sec. 5.

\(^{33}\)For example, "Correspondence - Mr. Barry's Bridge Charter." \textit{Sessional Papers} 39 Vic. (Victoria: Robert Wolfenden, 1876), pp. 709-21. H.M. Ball acted as an Assistant Commissioner of the Department of Lands and Works in negotiations about W.P. Barry's toll charter over the Quesnelle River in 1873.
carries with it the power of rewarding such judges as may be favoured by the ministry of the day by transferring them to more agreeable posts or visiting displeasure upon them by ordering them to the inhospitable districts of the interior, all which is incompatible with a continued faithful and unbiased discharge by the County Court Judges of their judicial function.\(^{34}\)

In his written opinion on the Act, M. Fournier, Deputy Minister of Justice, acknowledged the merit of the magistrates' objections to the County Courts Extension Act, 1874, but based its disallowance on the grounds that the local legislature could not delegate the power of appointment of County Court Judges to the Lieutenant-Governor as conceived by the Act. This was a power of appointment delegated to the Governor-General of Canada by the British North America Act and could not be amended by a provincial legislature. Walkem's first attempt to reform the county courts by legislation failed.

In the second year of the first Walkem ministry political debates over public works spending and representation in the Legislative Assembly took pre-eminence over reform of the county courts. Nevertheless, dissatisfaction with the courts continued to build, and vocal proponents of reform presented their grievances in the contemporary newspapers.\(^{35}\) The British Columbia Incorporated Law Society submitted a proposal to the federal Minister of Justice offering its opinion on the reform needed in the county courts. The members of the bar considered that it was desirable to create judicial districts in the province similar to those in the Ontario court system and to assign a professionally-

\(^{34}\)"Memorial of the County Court Judges," Canada, Department of Justice, Correspondence and papers relating to County Court Acts 1874, 1875. O'Reilly Collection, A/E/Or3/C165, BCARS.

\(^{35}\)"The Judiciary," \textit{Daily Standard} 16 December 1874, p.2. Criticizing the indolent Supreme Court Justices and suggesting that they might be used more effectively, the editor asked, "What about the far more important considerations of the public convenience and the actual interest of the people... We know we speak the unanimous opinion of the Mainland people on this subject." This editorial offered the formula to institute three circuits: Barkerville, Yale and Victoria, each served by one resident Supreme Court Judge. This was close to the plan finally implemented in 1881 to meet the legal needs of the mainland.
trained lawyer (chosen from the British Columbia bar) as County Court Judge to each district.\textsuperscript{36} Another indication that agitation to institute change was growing was that Lieutenant-Governor Langevin promised the legislative assembly at the opening of the parliamentary session that a bill to consolidate the statute law governing the administration of justice in the county courts would be laid before the representatives. Despite the urgency enmeshed in public discourse on the subject other domestic issues consumed the time of the session, and the issue of reforming county courts administration was neglected.

Prior to the session Attorney General Walkem had drafted a comprehensive bill aimed at consolidating the statute law governing the county courts and designed to amend some of the weaknesses of the system.\textsuperscript{37} But on its final reading, the County Court Extension Act of 1875 did not represent a significant advance towards reform of the courts. The original Bill, however, did propose progressive steps in the direction of codifying and formalizing court procedure. In two hundred and two sections the Bill set out the detailed civil procedure of the county courts. Former county courts legislation, including Attorney General Crease's consolidated statute in the \textit{Revised Statutes of British Columbia} (1871), adopted and made applicable English legislation in the province but did not print the text of the sited legislation. Walkem's Bill copied text and schedules from English and Ontario statute law and set to writing some of the practice of the courts in British Columbia. This was an important step towards making the complete practice of the courts known to a larger part of the

\textsuperscript{36} "Reform Suggested," \textit{Daily Standard} 4 January 1875, p.3.
\textsuperscript{37} A copy of the Bill # 31 "An Act to consolidate and amend the Ordinances and Acts relating to the procedure of the County Courts in the province of British Columbia." can be found in the Crease Collection Add MSS 54, file 12/65, folio 8156-8193. BCARS.
population than the few lawyers familiar with the English Acts. Following the movement in English common law courts to codify and formalize court procedure, the Bill included provisions that were intended to insure that suits were not decided on technical grounds, but rather on the facts of the cases.\textsuperscript{38}

Walkem's commitment to implement progressive reforms in the courts of British Columbia exemplified his concern that the public and the commercial classes be afforded the same legal rights enjoyed by North American contemporaries.

The Bill also sought to amend some of the weaknesses of the county court that compromised the administration of justice. Walkem's Bill set to writing descriptions of the court officers' duties and clarified the critical role of the clerk in the management of simple court procedures. By one provision, the "County Court Judge or ... appointed clerk" would continue to perform the responsibilities of the court registrar.\textsuperscript{39} The clerk was required to reside in an appointed district and was authorized to act in the capacity of a judge in cases where the debt was confessed or settled out of court.\textsuperscript{40} Since the ambiguity of this officer's responsibilities had caused mischief in the courts, provisions were inserted that restricted the clerk from acting as the sheriff or as an agent in the court.\textsuperscript{41} This

\textsuperscript{38}Ibid. Sec. 126. On Tenant law stated that "any defect or want of form in the information, summons, conviction, warrant of distress, or other proceeding relating thereto..." would not invalidate any order of the court or incriminate any court officers, see also sec. 180. Execution of debts. Cases struck out on the grounds of want of form had become an increasingly annoying problem for suitors in nineteenth-century. The Field Code of New York (1848) and Judicature Acts of England (1873 and 1875) included similar provisions to those copied by Walkem. The legislation was designed to simplify and expedite justice. See Friedman, \textit{A History of American Law}, pp. 340-358.

\textsuperscript{39}Bill #31, sec. 11. County Court Judges' administrative responsibilities; sec. 30 and 48 Continued the practice that anyone might serve summons; sec. 65. Lay agents allowed as advocates.

\textsuperscript{40}Ibid., sec. 135, 136 and 201.

\textsuperscript{41}Ibid., sec. 14. Clerk cannot perform the duty of high bailiff as well as clerk's duties; sec. 15. "...no clerk, high bailiff or officer of the court shall be engaged as attorney or agent for any party in any proceeding."
recommendation for reform attempted to work with the existing court structure and personnel of the bench, while codifying the informal practice of the county courts.

None of these constructive clauses were part of the final reading of the County Courts Extension Act, 1875.\(^{42}\) The sole provision of this enactment was to delegate authority to the Lieutenant-Governor in Council to divide the province into Judicial Districts. The consolidation of statute law contemplated by Walkem's Bill was rejected. And reform of the ambiguous procedure of the court was delayed. Edward Blake disallowed the abridged Act on the same grounds as the previous year's county courts legislation, pointing out that the province was assuming a power beyond its jurisdiction. Writing to the local government, Blake suggested that the administrators achieve their aim of creating judicial districts "by legislation" rather than by an order-in-council.\(^{43}\) The 1875 session failed to produce any consequential county courts legislation.

The year 1875 proved to be a seminal point in the reform of the courts for another reason. Arthur T. Bushby, the resident magistrate for New Westminster died 18 May 1875. Court business in New Westminster was on an ascending scale at the very moment the citizens of the most populated area on the mainland found themselves without a resident magistrate. The Lieutenant-Governor's Executive Council filed a request with the Secretary of State in June 1875 to provide a practising barrister to replace Magistrate Bushby.\(^{44}\) On the Fall Circuit of the Assize Court, the people of New Westminster voiced a similar

\(^{42}\) An Act to make provision for the better Administration of Justice, 1875, 38 Vic., c. 6.

\(^{43}\) Opinion on 'An Act to make provision for the better Administration of Justice, 1875." 13 October 1875, in "Return-Correspondence on Administration of Justice," Sessional Papers 40 Vic..(Victoria: Woffenden, 1877) pp. 441-442.

\(^{44}\) Ibid., Lieutenant-Governor J.W. Trutch to Secretary of State, 19 June 1875, p 440.
request through the agency of a Grand Jury Presentment to Justice Crease. Edward Blake, however, did not believe that there was statutable authority for the payment of replacement officer. Blake suggested that the interim measures that had been taken, whereby Magistrate O'Reilly had assumed the responsibilities of the New Westminster court, would suffice until a proper parliamentary provision for the appointment of a magistrate had been fulfilled. Ottawa once again delayed reform and shifted the responsibility for administering justice in British Columbia to the local legislature.

The session of 1876 was complicated by the fall of the Walkem ministry over questionable financial policies and by a second ministerial crisis. The county courts bill that the A.C. Elliot (Victoria City) administration (1876-78) had prepared was never tabled before the House, but, once again, the provisions of the proposed legislation revealed the prevailing ministry's objects for reform of the county courts. A new source of opinion on the needed reforms in the county courts heavily influenced the construction of the Bill. In a series of editorials published in the *Victoria Daily Colonist*, A.N. Richards, a immigrant from Ontario and the soon to be appointed Lieutenant-Governor of British Columbia, suggested that the courts ought to be modeled directly on the district courts of Ontario.

46A copy of the Bill # 41, "An Act to provide for the better Administration of Justice," can be found in the Crease collection Add MSS 54, file 12/65, folio 8207-8212. BCARS.
47The series of articles in the *Victoria Daily Colonist* were, "The Price of Justice," 28 July 1875, p.2; "The Administration of Justice," 10 August 1875, p.2; "Legal Procedure Reform," 12 August 1875, p.2; "More Law Reform Needed," 15 August 1875, p.2; "Further Court Reform Needed," 17 August 1875, p.2.; "Law Reporting," 25 August 1875, p.2; "Jury Reform Needed," 29 August 1875, p.2; "Law Reform," 12 January 1876, p.2 This last article revealed that the author of the past summer's law reform articles had been A.N. Richards.
In Ontario professionally-trained judges with greater jurisdictional powers presided over district courts. The courts had jurisdiction in equity as well as in common law actions. The judges also presided over Quarter Sessions of the Justices of the Peace Court. In their capacity as Chairmen of the Quarter Sessions, the judges heard appellate applications from the Justices of the Peace Court. These appeal cases included criminal cases, which meant that Ontario County Court Judges had jurisdiction in criminal and civil disputes. In the Ontario justice system, resident judges conducted court business locally, and superior court judges with greater jurisdictional powers were not required to make frequent circuit courts. Richards believed that this judicial structure, including the scale of costs used in Ontario courts, ought to be adopted in British Columbia. His vision of the county courts greatly expanded the jurisdiction of the inferior courts and was intended to make justice more accessible and inexpensive.

Attorney General Elliot's proposed legislation followed many of the suggestions offered by Richards, but it was also formulated to meet the specific needs of the mainland for more accessible and efficient justice. Elliot's Bill contemplated creating two Judicial Districts on the mainland, New Westminster and Cariboo, which would be served by professionally-trained judges. In addition to having cognizance in all civil cases, the County Court Judges of New Westminster and Cariboo would have acted as Chairmen in Courts of Quarter Sessions, had jurisdiction in equity, possessed power to appoint guardians for infants and other wards of the state, had jurisdiction in questions relating to the testacy of wills, and had authority to grant probates of wills.\(^{48}\) Under the extant

\(^{48}\)Bill #41, An act to provide for the better Administration of Justice, 1876, 39 Vic., c.41, sec. 9.
county court system, these duties were reserved for the Supreme Court Judges, and mainland residents had to make application to Victoria to receive these legal services. As much as the proposal infringed upon the customary business of the Supreme Court, it did not obviate the need for the superior court. Circuit courts would have been necessary to preside over Assize and Nisi Prius Courts, and the Supreme Court Justices would have heard all appeals from the county courts. This proposal for court reform would have "leveled up" the inferior courts of the mainland and required personnel changes on the bench. Despite the urgent need for such reforms, the chaotic nature of domestic politics during the 1876 session required that Elliot dismiss any plans for court reform that year, and consequently, the Bill was never introduced.

In 1877 the struggle for control over civil procedure in the courts intensified. The local legislature enacted iconoclastic and pernicious court reform legislation, and at this juncture, the Supreme Court Justices circulated their own proposals for court reform. Three bills were introduced during the session to improve the inferior courts of the province. Elliot introduced An Act to amend the Gold Mining Ordinance of 1873. The Bill provided that Gold Commissioners would have cognizance in all civil actions normally reserved for hearing in the county courts. The proposed statute was limited to applicability in the Cassiar and Kootenay, but it answered a long-standing grievance in these communities for a resident judge who might hear civil actions. Theoretically, civil justice there had been served by County Court Judges on circuit. In practice, Supreme Court Judges on circuit handled the majority of civil actions in these districts after Confederation, or suits were brought to Victoria to be adjudicated.

by Supreme Court Judges. Speaking on the Bill, T.B. Humphreys (Victoria Dist.) commented that it was likely unconstitutional, "but it would bring home to Dominion officials the need of County Court Judges in these districts." The Bill passed the third reading but was disallowed by Ottawa.

Another Bill, the County Courts Act, 1877, was the consummation of years of legislative debate about needed reform in the inferior courts. The Attorney General proposed dividing the province into distinct Judicial Districts and awarding expanded jurisdictional powers to County Court Judges. Unlike Elliot's Bill of the previous session the County Courts Act, 1877, considered the practice of the courts on Vancouver Island, as well as on mainland, making it a more comprehensive piece of legislation. The amount recoverable in the court was extended to $1000, and the courts' jurisdiction in equity was formally confirmed. Judges were awarded cognizance in questions relating to testacy or intestacy and delegated power to grant probates of wills to the amount of $2500. And an new authority, the power to grant injunctions, was delegated to the judge of the county court. In addition to these new jurisdictional powers, another Bill produced during the session, the Justices of the Peace Appeal Act, 1877, provided that the county court would be an appellate division court. The provisions of these statutes would have transformed the practice of the courts and created powerful local courts throughout the province.

While the County Courts Act, 1877, placed the incumbent magistrates in a very ambiguous position it contemplated reforming a bureaucratic institution to
make it more serviceable for the residents of the mainland. The statute confirmed the terms of the magistrates' employment and secured them a pension, but the operation of the statute required professional judges. The pernicious intent of the legislation was to superannuate the current magistrates. A.E.B. Davie (Cariboo) supported Elliot's county courts Bill, and he commented that with professional men the proposed statute would be good for the interior. Members of the mainland communities would have been afforded the means to conduct their personal legal matters concerning hereditaments locally.

Moreover, a resident judge invested with the power to grant injunctions was important to the commercial community. In the event of a dispute over a claim, a mining company could procure a temporary injunction against another to stop its operation. Investors, too, acquired a measure of protection from this provision. If a company directorate levied a call on shares that appeared irregular, stockholders would have been afforded the right to apply to a local court officer to force an injunction on the call on shares. This clause empowered stockholders to control the fiscal policy of a company's directorate. These considerations were not hypothetical, especially in the volatile mining industry. Mainland residents needed access to legal services centralized in Victoria by extant statute law.

Elliot's county courts Bill contemplated overhauling the inferior courts by upgrading the legal services provided by the courts. The Bill passed through the British Columbia Legislative Assembly with little debate, suggesting that the members of the legislature shared the Attorney General's opinion that reform of

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53 Legislative debate as reported in the *Daily Standard* 23 March 1877, p. 3.
the courts was necessary. The legislation could not incorporate the existing judicial staff, and legislators recognized this consideration. Instead it required a new, professionally-trained class of officers who would be able to deliver doctrine-based legal services to the centers of population in the province. The twin-tiered jurisdictional division between the inferior and superior courts was maintained, but the statute shifted some of the responsibility of the upper to the lower division. Legal services that had been provided by the Supreme Court Justices on circuit or by application to Victoria were transferred to the jurisdiction of resident County Court Judges. The superior courts would have continued to act as a court of record (meaning it would have had original jurisdiction) in important criminal and civil cases and as an appeals court for cases from the county courts. The County Courts Act of 1877 sought to institutionalize the level of legal services available in the courts of British Columbia according to a national standard: the Ontario courts system.

Opponents of the reform measures questioned the need for an elaborate justice system in the underdeveloped province of British Columbia. Justice Crease engaged in a furious letter writing campaign to table his own program for reform of the courts. Asked by Minister of Justice Blake for his opinion on the needed reform, Crease freely offered advice that was at the same time insightful and biased by self-interest. The major thrust of Crease's proposals was that the available judicial power in the province could be better utilized and comprehensive reform was not necessary. Crease recognized that New Westminster, Nanaimo and Victoria required the legal services of professionally-

54 No voting divisions on this resolution are available in the Journals of the Legislative Assembly. 55 Blake to Crease 5 February 1877, Add MSS 54, file 12/65. BCARS.
trained judges. Crease and Justice Gray believed that the Supreme Court Justices could assume the responsibilities of the county court work in these areas. In contrast to legislators, the judges did not believe that the rest of the province required the services of professionally-trained judges. Crease argued that individuals unfamiliar with the real needs of the country forwarded the proposition to implement an Ontario-based system of justice. And he considered the legislation that was intended to expand the jurisdiction of the County Court Judge meddlesome because it created problems of inferior and superior courts with concurrent jurisdiction. Crease feared that the Supreme Court would be reduced to the position of an appeals court and that the status and dignity of the superior court would be lowered.

Crease's objections to the legislation were effective in persuading the federal government to disallow the Act. In addition, Crease's furtive correspondences may very well have sealed the fate of the incumbents of the county court bench. The Supreme Court Judges were in agreement that they could handle the county court business of the lower mainland and island and thereby provide a means for Ottawa to superannuate three or four of the magistrates of the county court. The judges accepted as a temporary measure that certain of the incumbent magistrates and gold commissioners should continue to administer justice along the line of the Cariboo Road and in the remote mining districts. But to give authority to his proposal that the Supreme Court Judges perform the county court work, Crease suggested to Blake that he

56 Crease to Blake 9 April 1877, Add MSS 54, file 12/65. BCARS. Crease stated that the Supreme Court Judges "do a great deal of work, it is also equally true that they are capable and willing to do more." Folio 8327; Justice Gray to Blake 12 July 1877, Add MSS 54 file 12/66, BCARS. Gray offered the services of the Supreme Court Judges on the lower mainland and island at an increased salary. Folio 8442.
take authorship for the reform measure. Whether the idea that the Supreme Court Justices assume county court responsibilities was Blake's "suggestion" or whether provincial legislators independently formulated the scheme, legislators incorporated this construction in their next reform proposal for the county courts.

"Mr. A.R. Robertson's Bill", as Crease termed an early draft of the Better Administration of Justice Act, 1878, introduced a justice system proposal that eliminated the need for any County Court Judges. A.R. Robertson may have initiated the proposal, but it was adopted as a government measure by the second Walkem administration. Ottawa's disallowance of the previous session's county courts and gold commissioners' courts legislation had frustrated legislators. Since the only justice system legislation approved by and acted upon by Ottawa revolved around the appointment of additional Supreme Court Judges, provincial legislators decided to attempt to use this device to affect reform. The 1878 court reform legislation delegated authority to the Governor-General to appoint two new Supreme Court Judges for British

57 April 1877 Add MSS 54, File 12/65, folio 8331. BCARS. At present I lay before you the suggestion that it should come back from yourself then the Supreme Court Judges would I think find ready response- namely that the SCJs take into their hands all the CC work of Victoria, Nanaimo, Cowichan, Comox, NW and Yale. (emphasis in original).

In a later missive to Blake, 10 July 1877, Crease actually refers to "the consideration of that portion of the subject submitted to us by the Hon. E. Blake on the 2 May- How far the SCJs can assist [in the county court work] in the outlying districts?" Add MSS 54, file 12/65, folio 8411. BCARS.

58 As noted by Hamar Foster, "...Law and Politics in British Columbia," p. 181. One copy of an early draft of the Bill, An Act to make provision for the administration of Justice in the Province of British Columbia, 1878, is in the Crease collection, entitled in Crease's hand-writing "Mr. A.R. Robertson's Bill of the previous session," Add MSS 54, file 12/65, folio 8372. BCARS. A second copy of Bill # 3, as introduced by Walkem, An Act to make further provision for the administration of Justice, 1878, is in the O'Reilly collection, file A/E/Or3/C165, BCARS. The short title of the sanctioned Act was, The Better Administration of Justice Act, 1878, 41 Vic., c.20.

59 Puisne Supreme Court Judge Appointment Act, 1872, 35 Vic. c. 22.
Columbia whose residence was to be on the mainland. These judges and their brother judges would assume the responsibility of all county court work.

This civil procedure reform proposal introduced an original direction for the administration of justice. Whereas colonial and provincial administrators had consistently followed the Ontario model of a twin-tiered jurisdictional division between superior and inferior courts, each with their own separate officers, this proposition for reform broached the concept that one class of officers could provide all of the legal services required by the public. The judicial systems of Manitoba and Nova Scotia followed this prescription for the most efficient dispatch of justice. In those provinces Supreme Court Justices performed the services of the County Court Judges at a reduced scale of fees. In 1856 Vancouver Island had tried this judicial arrangement. Justice Cameron had presided in both the Supreme Court of Civil Justice and the Small Debts Court, but this construction had proved unmanageable. In 1878 this arrangement would have maximized the utility of the available judicial power and assured patrons of the courts access to competent judges, but it also required additional judicial appointments. The residency provision of the statute legislated a contingency of the Judge's commission and assured the residents of the mainland access to local courts. The Better Administration of Justice Act, 1878, addressed the substantial grievances of the public and was a responsive piece of legislation offered to control the operation of the courts and its officers.

The Supreme Court Judges retreated to a more ethereal defence of their status and dignity when confronted with this radical reform measure. Crease laboured to show that the Supreme Court of British Columbia was a Dominion
court as established by Imperial Act. This interpretation construed the judges as Dominion officers who were beyond the legislative prerogative of provincial politicians. The judges felt that the Act altered their original commission as superior court judges and adjoined an additional responsibility, service in an inferior court, to their contract. Crease resorted to a defence of "family values," imputing that prescribing the residence of the judges would mean the destruction of their families. In addition to his more emotional appeals for disallowance of the legislation, Crease offered some practical observations on the weaknesses of the Act. The Better Administration of Justice Act, 1878, was formulated to transform the practice of the courts and direct the administration of justice away from its path of historical development as a copy of Ontario's twin-tiered courts system. Crease offered computations that showed the proposed system would have been more expensive, and he derided the clause that stipulated that three of the judges reside on the mainland stating that it would destroy the integrity of the Supreme Court as an appellate division.

In light of Crease and Gray's earlier suggestions to the Minister of Justice that the superior court judges would be willing to take on the responsibility of some of the county court work, it is difficult to understand their militant reaction to this piece of legislation. The reasons for their objections were essentially personal rather than professional. The Justices were more interested in

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60 Crease to Lash, 9 September 1878, Add MSS 54, file 12/65, folio 8497, 8509; Crease to Lash 20 September 1878, Add MSS 54, file 12/65, folio 8524-30; "Rough incomplete draft of some of the preliminary heads of objections of the Judges" 21 April 1879 sent to (Senators) C.F. Cornwall, E. Dewdney and W.J. Macdonald, Add MSS 54, file 12/65, folio 8538-8544. BCARS.
61 "Rough incomplete draft of some of the preliminary heads of objections of the Judges" 21 April 1879 sent to (Senators) C.F. Cornwall, E. Dewdney and W.J. Macdonald, Add MSS 54, file 12/65, folio 8542. BCARS; Gray to Blake, 12 July 1877, Add MSS 54, file 12/66, folio 8444-5. BCARS.
maintaining their social position in Victoria and remaining close to the advantages of nineteenth-century elite society than meeting the demands of their stations as public servants. They rejected the proposal that superior court judges should handle county court work in the entire province. Crease considered that this construction "leveled down" the superior courts when the real change that was needed was to "level up" the inferior court. The judges had offered to serve in the inferior courts on Vancouver Island and the lower mainland; they were not willing to serve in the mainland interior. They recognized that residency in these regions was the only practical means to meet these areas' legal service needs, and they absolutely refused to consider such a proposition. To serve Nanaimo and New Westminster the judges could maintain their residency in Victoria and make circuit courts, coinciding with superior court circuits, to these cities. The Better Administration of Justice Act required province-wide service from the superior court judges and stipulated a residency clause. These features of the Act made it completely objectionable to the judges.

Ottawa sanctioned the Better Administration of Justice Act, 1878, and it proved to be the legislation that inaugurated real change to the courts. Crease and his supporters were able to delay the provincial legislature from asserting its control over provincial court officers. But for all intents and purposes, Ottawa's sanction of this legislation sealed the fate of the county court. Until

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62 The three Justices all had substantial homes in Victoria as did Magistrate O'Reilly. Crease's third home in British Columbia is described in "Judge Crease's New Mansion," Daily Standard 12 June 1875, p.3. They enjoyed the social diversions of Victorian life; Begbie was an avid cricketer, Begbie, Gray and Crease were on the board of the Provincial Rifle Association and all three were standard invitees at prestigious "At Homes" and other gala balls.

63 Hamar Foster has written about the prolonged internal struggle for control of the Supreme Court. See "...Law and Politics in British Columbia."
December 1880 the incumbent magistrates continued to adjudicate disputes in the county courts. At that juncture Ottawa made two new appointments to the Supreme Court bench, and these appointees served the mainland county courts. The civil court business of the lower mainland and Vancouver Island was handled by Begbie, Crease and Gray while on circuit. After 1880 Peter O'Reilly was appointed Indian Commissioner and Augustus Pemberton continued to act in the capacity of Police Magistrate of Victoria. H.M. Ball, E.H. Sanders and W.R. Spalding were pensioned, as guaranteed by their contracts with the Imperial government.

When the changes to the judicial staff of the county court were made some, but not all, of the public's grievances about the court were answered. At last the lay magistrates of the court were replaced by professional judges in all of the Judicial Districts of the province. Three Justices lived in Victoria, Cariboo and Lillooet received resident judges and the remainder of the province was served by itinerant Supreme Court Justices. Ironically, New Westminster, which had been the focal point of dissatisfaction with the county court, did not receive a resident judge. Justice Gray was assigned to the New Westminster district, but he refused to abide by the federal government's order. Instead New Westminster continued to be served by circuit courts. Other problems with the court received varied response. Addressing the complaint about the expense of the courts, in 1878 a General Order was published in the *British Columbia Gazette* regulating court fees in the superior and inferior courts. Court fees were not reduced, but the Order did establish upward limits on the fees that could be taken by attorneys and sheriffs. Contrarily, no provisions were made in any civil
procedure legislation to clarify the ambiguous roles of the court's officers other than the County Court Judge.

The Better Administration of Justice Act of 1878 initiated reform of this government institution, but it did not solve all of its problems. Complaints about the county court continued into the 1880s. Members of the outlying communities of Kootenay and Cassiar still demanded resident judges, and to address this grievance, S. Duck (Victoria City) re-introduced the proposition that lay magistrates preside over courts in the Kootenays. In May 1884 the government responded to the incessant demand for local magistrates and appointed Eli Harrison as the County Court Judge for Cariboo and other County Court Judge appointments followed. These appointments signaled a return to the twin-tiered system of courts experimented with throughout the history of the British Columbia. After 1884 the province was served by professional superior and inferior court judges with separate jurisdictions.

The publication of the *County Court Rules* in 1885 represented the culmination of legislative effort to formalize court practice. This volume set to writing the definitive legislation governing the rules of practice in the court and the schedules for proceedings in all jurisdictions of the court. It finally

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65 Legislative debates as reported in the *Daily Standard* 11 January 1884, p.3. Duck wanted to award Justices of the Peace jurisdiction in civil cases to $500.
66 By the authority of An Act Relating to County Courts, 1883, 46 Vic., c.5. sec. 9.
67 Crease had foreseen the return to the traditional thinking about the courts in 1878. Crease to Lash 9 September 1878, Add MSS 54, file 12/65, folio 8514. BCARS... and when the experiment has had time enough to fail and the old system must be revived. the inevitable new County Court Judgeships which must then be created will be so many additional prizes to be obtained. So many incentives to a new and prolonged agitation!
addressed the problem of defining the ambiguous position of court officers other than judges, and essentially instituted job descriptions for these court officers contemplated by Walkem's original County Courts Extension Act, 1875. The completion of the transcontinental railway in 1885 linked British Columbia to eastern Canada, and the publication of the 1885 Rules concluded a legislative effort to bring county court practice up to a national standard. The year 1885 represented a seminal point in the administration of justice in the province and the beginning of a new era in British Columbians' progress towards their goal of economic development.
CHAPTER 5

CONCLUSIONS: THE SIGNIFICANCE OF COURT REFORM FOR
THE ORGANIZATION OF BRITISH COLUMBIA SOCIETY

A credit network was crucial to the smooth operation of British Columbia's economy. Industrialists and stock-holders invested capital in resource extractive ventures anticipating future returns. Merchant traders based in Victoria and New Westminster advanced goods on credit to petty traders throughout the province. In turn these petty traders sold groceries and shop goods to subsistence farmers and other pioneers on credit. The majority of labour contracts were credit relationships, too. Employers retained the services of wage labourers on the condition of future remuneration. A forester paid a teamster or a sawyer after the sale of a boom of logs, and a rancher paid a cowboy after the sale of a herd of cattle. This network of credit relationships required an efficient and effective dispute resolution mechanism to settle disagreements between parties to contractual agreements. Legislators pursued reform of the county courts in the 1870s in order to establish a state institution that could serve this function.

Throughout the 1870s while British Columbia was wrangling over the Terms of Union, demanding a transcontinental railway and attempting to work out its position as a province in the Canadian confederation, legislators were also implementing reforms to governmental institutions that rationalized the processes of government. British Columbia's historians have concentrated on these other issues because they were the most prominent points of debate in the provincial legislature and the subject of endless editorials in the contemporary
newspapers. Although court reform and reform of other state institutions were more subtle developments and have received less attention from nineteenth-century and modern commentators, their significance for the organization of British Columbia society was perhaps more important.

Reform of the county courts in British Columbia represents one example of the rationalization of governmental institutions typical of the nineteenth-century.¹ Litigants in the courts, and especially creditors, demanded standardized procedures and codified laws. The provincial government responded by implementing court reform that replaced the lay magistrates of the county court with professionally-trained judges. Through this reform the state indirectly gained control over standards for commercial relations. Since the professionally-trained judges issued doctrine-based decisions, litigants were required to follow state-mandated prescriptions for commercial agreements if they wanted to be successful in the court. In a very subtle way court reform changed the way people conducted their commercial transactions. In the broad perspective court reform established the footing for the growth of capitalist social relations. The formalization of court procedure buttressed the economic power of creditors and the social position of white male British Columbians, further empowering them to dictate the future development of the province.

¹See a recent publication on this subject which proposes to challenge the "liberal myth of the liberal state." Allan Greer and Ian Radforth, "Introduction," in Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada. eds. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), p. 13.

Where others have dwelt on legal and constitutional developments that theoretically subjected government to the control of citizens, we insist on the need to study the actual practices by which citizens came under the control of the state.
APPENDIX A

The appendix to this thesis is the machine-readable data upon which Chapter 3 is based. The use of the computer databases on file on the attached computer disk requires an IBM™ compatible micro-computer equipped with Excel™ software. To use the software to its full capacity it is suggested that the computer operator employ a companion volume to the software entitled, The First Book of Microsoft® Excel for the PC by Christopher Van Buren as a reference.¹ This book is not essential, however, because the spreadsheet software is very simple to use. For those who do not choose to use the reference volume, I will sketch the basics for conducting searches and the method for extracting designated records from the spreadsheet.

First, a number of abbreviations employed in the data entry of the court records from the Plaint and Procedure Books need explaining:

- j/s: judgement summons
- a/c: account rendered
- n/a: non-applicable
- soc: settled out of court
- pl: plaintiff

To conduct a search three steps are necessary

1. set the database (pre-set)
2. enter search selection in cell below the criteria range

3. Prompt computer to extract matching records

   Step One. The database need only be activated one time, unless a researcher wants to search a section of the database other than the pre-set database. As the file stands the entire selection constitutes the database. The criteria range is Row 1242 on the New Westminster court records database. The extract range is Row 1246. And respectively, Rows 81 and 85 on the Lytton database. It is possible to re-set the database for any selection of rows and columns from the whole. If the researcher wants to search the entire selection, no input is necessary.

   Step Two. The search selection that the researcher wants to investigate is entered in a cell in the row below the criteria range. The entry must match one of the entries in the cells of the spreadsheet and be entered in the appropriate column of the criteria range. Prompt the computer with the Enter button.

   Step Three. An on-screen message asks the computer operator, "match unique records only." Indicate the appropriate response.

   The soft-ware program will retrieve the requested records matching all record entries that contain the detail entered in the corresponding cell of the criteria range.
### APPENDIX B

**Lytton County Court Plaint and Procedure Book, 1871-1880**

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